

Supreme Court U. S.  
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-1171**

**JAMES Y. CARTER**, Public Vehicle License  
Commissioner of the City of Chicago,

*Petitioner,*

VS.

**LUTHER MILLER**, on his own behalf and on  
behalf of all others similarly situated,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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FOR THE SEVENTH CIRCUIT**

The petitioner, James Y. Carter, Public Vehicle Commissioner of the City of Chicago, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on January 4, 1977.

## OPINIONS BELOW

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The memorandum opinion and order of the district court in favor of defendant-petitioner, entered January 17, 1975, are unreported but are reproduced below in Appendix A.

The opinion of the Court of Appeals, filed January 4, 1977, reversing the judgment of the district court, is not yet reported. It is reproduced in Appendix B.

## JURISDICTION

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The judgment of the Court of Appeals was entered on January 4, 1977.

A motion for stay of mandate pending application to this Court for a writ of certiorari was filed on January 24, 1977. On January 25, 1977, an order was entered by the Court of Appeals staying the mandate until February 24, 1977.

The jurisdiction of this Court herein rests on U.S. Code Title 28, § 1254(1).

## QUESTION PRESENTED

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Is an ordinance which conclusively denies issuance of a public-chauffeur's license to any applicant convicted of certain armed felonies violative of the Equal Protection Clause because revocation of a present licensee's previously granted license is discretionary rather than mandatory?

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

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### Constitution of the United States

#### Amendment XIV:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### United States Code

#### Title 42, § 1983:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

## **Municipal Code of the City of Chicago**

### **Chapter 28.1-2:**

It is unlawful for any person to drive a public passenger vehicle on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city without first having obtained a license as a public chauffeur.

### **Chapter 28.1-3:**

Applications for public chauffeur licenses shall be made in writing to the commissioner upon forms provided by him therefor. . . .

No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon . . .

### **Chapter 28.1-10:**

If any person has obtained a public chauffeur's license by application in which any material fact was omitted or stated falsely, or if any chauffeur shall become unfit to operate a public passenger vehicle on account of any infirmity of body or mind or because of addiction to the use of drugs or intoxicating liquors, or shall violate any criminal law which, if committed for such offense, would disqualify any applicant for a chauffeur's license . . . the commissioner may recommend to the mayor that his license shall be revoked and the mayor, in his discretion, may revoke such license.

## **STATEMENT OF THE CASE**

### **The Complaint**

In his amended complaint the respondent sought injunctive and declaratory relief from Chapter 28.1-3 of the Municipal Code of the City of Chicago which provides that no public chauffeur's license (taxi driver's license) "shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon . . . ." Respondent alleged that he had been convicted of armed robbery, had served a sentence in the Illinois penitentiary and completed parole. He alleged that pursuant to the ordinance and based upon his criminal conviction he had been denied a public chauffeur's license. This denial, he alleged, was in violation of his rights under the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States.

### **The Decision of the District Court**

In its memorandum opinion and order (Appendix A) the District Court dismissed respondent's complaint. The court found that the ordinance did not violate the Eighth Amendment because punishment of offenders was not its purpose. The court found no denial of equal protection because the classification of persons convicted of a crime involving use of a deadly weapon is rationally related to the protection of the users of public vehicles. Finally the court declared that an irrebuttable presumption barring a specified class of persons from a certain occupation is not a denial of due process where, as in this instance, there is a rational relationship between the classification and goals sought to be achieved.

### **The Opinion of the Court of Appeals**

The judgment of the Court of Appeals for the Seventh Circuit (Appendix B) reversed and remanded the decision of the district court. The court of appeals concluded that the ordinance which conclusively denies a public chauffeur's license to any applicant convicted of an armed felony resulted in a denial of equal protection because another ordinance provides that a present licensee's license is not automatically revoked as a consequence of such an offense, but instead may be revoked in the discretion of the Mayor. The court did not hold that applicants for the license have a due process right to a hearing nor did it consider the differing interests of present licensees and new applicants as bases for differing procedural treatment. Rather, the court assumed that the class in issue was that of ex-offenders and held that the mandatory denial of a license to newly applying offenders constituted a denial of equal protection as a consequence of the fact that revocation of licenses of offenders already licensed is discretionary.

The court of appeals declined to rule on respondents' due process arguments. A concurring opinion of District Judge Campbell, however, considered respondents' contention that the ordinance constituted an impermissible irrebutable presumption and concluded that the ordinance should be held violative of the Due Process Clause.

### **REASONS FOR GRANTING WRIT**

**THE HOLDING THAT INCUMBENT LICENSEES AND NEW APPLICANTS MAY NOT BE SUBJECT TO DIFFERENT PROCEDURAL TREATMENT IS CONTRARY TO PRINCIPLES LAID DOWN BY THIS COURT.**

**AN EQUAL PROTECTION RIGHT TO A HEARING IN THE ABSENCE OF A DUE PROCESS CLAIM TO A HEARING IS WITHOUT PRECEDENT AND ESTABLISHES A NEW THEORY OF ENTITLEMENT TO HEARINGS IN A BROAD RANGE OF GOVERNMENT ACTIVITIES.**

The Municipal Code of Chicago conclusively denies a taxi driver's license to any new applicant having been convicted of an armed felony but allows revocation of a current licensee's license for such conviction only after a hearing. The Court of Appeals found this disparity to be an irrational discrimination in the treatment of offenders and accordingly held it violative of the Equal Protection Clause. The court specifically did not find the respondent applicant to have interests entitling him to a hearing as a matter of due process but instead accorded him a hearing as a matter of equal protection.

In holding this disparity to be an irrational discrimination the Court of Appeals ignored decisions of this Court which permit recognition of substantially differing interests of new applicants and present licensees as an appropriate basis for the differing treatment of the two classes. Moreover the recognition of an equal protection claim to a hearing where due process analyses do not mandate such a proceeding is unprecedented and opens a new avenue to claims for hearings in a wide range of governmental activities.

Possession of a chauffeur's license is an essential condition of employment as a taxi driver in the City of Chicago. (Chapter 28.1-2, supra p. 4) For this reason the City's licensing officers have effective power to terminate the employment of any taxi driver in the City. Indeed the revocation of a driver's license operates not only to terminate that individual's current employment relationship but permanently ends his eligibility to continue in his chosen calling with any other employer of taxi drivers in the City. Thus although the City is not an employer of taxi drivers its influence over a driver's livelihood equals or exceeds the power it would have if drivers were in fact governmental employees. In recognition of this power over continued employment the City's revocation procedure includes a hearing. This Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), indicate that were the City the employer of drivers such a hearing would be a mandatory due process requirement. The interests affected by license revocations plainly merit similar procedural treatment in the opinion of the City Council, whether required by the Constitution or not.

The interests of new license applicants such as respondent, however, are clearly different. Like new applicants for governmental employment they have no rights analogous to a property interest upon which a due process entitlement can be premised. Had they such an interest this case could and would have been straightforwardly resolved in respondent's favor upon the due process arguments which he vigorously advanced in both the district court and the court of appeals.

Thus the disparate treatment accorded applicants and incumbent licensees simply reflects the differing interests of career drivers and those who contemplate such employment for the first time. For these reasons that disparity is not based, as the court of appeals held, upon an irrational distinction.

\* \* \* \*

The decision of the court of appeals in finding respondent entitled to a hearing solely on equal protection grounds cited no authority and is indeed unprecedented. It suggests a wholly new theory of entitlement to hearings in governmental licensing proceedings. Perhaps more important are the implications of this decision in the area of governmental employment. Because of the substantial similarity of interests of applicants for occupational licensing and applicants for governmental employment it appears clear that the decision of the Court of Appeals will open the door to claims for hearings by unsuccessful aspirants to public employment. Thus the scope of *Board of Regents v. Roth* and *Perry v. Sindermann* will be vastly broadened to reach a result which is indeed inconsistent with the doctrine of those decisions. For these reasons the implications of the decision extend beyond the licensing of cab drivers in the City of Chicago and merits the early attention of this Court.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February 23, 1977

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division

LUTHER MILLER, et al.,	}	No. 74 C 2886
vs.		
JAMES Y. CARTER,		
	<i>Plaintiffs,</i>	
	<i>Defendant.</i>	

### MEMORANDUM OPINION AND ORDER

Plaintiff has brought this suit as a class action seeking an injunction against enforcement of an allegedly invalid ordinance of the City of Chicago. His claim is asserted under 42 U.S.C. §1983 to redress the deprivation under color of state law, of rights guaranteed under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. The defendant has moved to dismiss the complaint.

The plaintiff, Luther Miller, was convicted in 1965 of armed robbery. After serving his sentence and fulfilling the conditions of his parole, on September 6, 1974, he attempted to apply for a public chauffeur's license. This license is an absolute prerequisite to employment as a public chauffeur, pursuant to Chicago Municipal Ordinance 28.1. Plaintiff was not allowed to apply by the Public Vehicle License Commission because of a provision of the above ordinance which denies such a license to anyone convicted of "a crime involving the use of a deadly weapon". Ch. 28.1-3. It is this provision which is challenged herein.

Plaintiff challenges the provision on the grounds that it is cruel and unusual punishment, that it violates his rights to due process in that it establishes an irrebuttable presumption, and that it violates his right to equal protection under the law. Since the ordinance is not meant to be a means of punishing offenders, there is no basis for concluding that it is violative of the Eighth Amendment. Furthermore, there is clearly a rational relationship between the classification created, those persons convicted of a crime involving the use of a deadly weapon, and the goal of this ordinance, the protection of the public who make use of public vehicles. cf. *Slaughter v. City of Chicago*, No. 71 C 2986, N.D. Ill., June 7, 1972. Therefore, there are no grounds for finding a violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff argues strenuously that this ordinance creates an irrebuttable presumption that persons who have been convicted of a felony involving the use of a deadly weapon are unfit to be entrusted with the responsibilities imposed upon holders of public chauffeur's licenses. While this is one way of regarding the ordinance, it does not help to focus the legal issue. The Supreme Court has upheld the use of a *per se* rule to exclude a class of persons from a certain occupation in *DeVeau v. Braisted*, 363 U.S. 144 (1960). The test of the appropriateness of the classification is whether it has a reasonable relationship to the goals sought to be attained. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). The ordinance in issue here meets that test.

Accordingly, defendant's motion to dismiss is granted.

Enter  
Frank J. McGarr  
United States District Judge

Dated: January 17, 1975

## APPENDIX B

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

No. 75-1162

LUTHER MILLER, et al.,

*Plaintiffs-Appellants,*

v.

JAMES Y. CARTER,

*Defendant-Appellee.*

Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division  
No. 74 C 2886—Frank J. McGarr, Judge.

ARGUED JUNE 3, 1975—DECIDED JANUARY 4, 1977

Before TONE and BAUER, *Circuit Judges*, and  
CAMPBELL, *Senior District Judge*.\*

*Per Curiam.* The issue before us is whether a Chicago ordinance which permanently bars persons convicted of certain offenses from obtaining a public chauffeur's license violates the due process and equal protection clauses of the Fourteenth Amendment. The District Court sustained the ordinance. We reverse.

Plaintiff was convicted of armed robbery in 1965, when he was 20 years old, and, after serving seven years

\* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

in the Illinois State Penitentiary, was paroled in 1972. He satisfactorily completed his parole and was discharged in August 1973. In September 1974 he applied for a public chauffeur's license to qualify for employment as a taxicab driver. His application was refused on the ground of Chicago Municipal Ordinance, Ch. 28.1-3, which provides that such a license may not

"be issued to any person at any time after conviction of a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape."

Plaintiff thereupon filed this action for injunctive and declaratory relief. The motion of the defendant, the city's Public Vehicle License Commissioner, to dismiss the complaint was granted by the District Court, and judgment was entered in his favor.

Chapter 28.1-2 of the Chicago Municipal Ordinance requires that any person employed in "transporting . . . passengers for hire" have a public chauffeur's license. Applications for the license are made to the commissioner, who submits the name of an applicant to the captain of the police district in which the applicant resides for a "character and reputation" investigation. Ch. 28.1-4. After receiving the police captain's report, the commissioner rules on the application:

"If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license." Ch. 28.1-4.

The commissioner is prohibited, however, as we have seen, from issuing a license to any person convicted of certain crimes, including the one of which plaintiff was convicted. Persons convicted of felonies not listed in the passage quoted above, and of other crimes involving moral turpitude, are ineligible to apply for licenses for a period of eight years following conviction. Ch. 28.1-3.

In *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), this court held unconstitutional the Public Vehicle

License Commissioner's denial of an application for a public chauffeur's license under a clause of Ch. 28.1-3 which prevented the issuance of a license to any applicant "subject to . . . infirmity of . . . mind . . . which may render him unfit to drive a public passenger vehicle." We held that the due process clause of the Fourteenth Amendment required that a "governmental licensing body which judges the fitness of an applicant must afford that applicant adequate notice and a hearing." *Id.*, 489 F.2d at 1382. Such a hearing on plaintiff Luther Miller's application, however, would be a mere formality because of the prohibition in Ch. 28.1-3 against granting a license to one who has committed a crime involving the use of a deadly weapon.

In addition to the provisions previously discussed, the ordinance specifies standards of conduct required of licensees and sets penalties for violations of those standards. Ch. 28.1-10 through 28.1-15. Ch. 28.1-10 describes, as conduct which can lead to the revocation of a license, the violation of "any criminal law which, if convicted for such offense, would disqualify any applicant for a chauffeur's license. . . ." Engaging in this behavior does not, however, lead to automatic revocation. Rather, "the commissioner *may* recommend to the mayor that [the] license . . . be revoked and the mayor, *in his discretion, may* revoke such license." (Emphasis supplied.) Thus, plaintiff Miller is absolutely barred from obtaining a license, although he was convicted of armed robbery over eleven years ago, while someone who already holds a license may be permitted to retain it, although convicted of armed robbery only yesterday.

The city's purported justification for this different treatment of persons who commit one of the listed offenses after receiving a license is that they have a "track record" that the commissioner and mayor can balance against the felony in evaluating fitness. The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before

licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. Indeed, one who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would, according to the ordinance, also be eligible to retain the license, for under Ch. 28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation.

Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment.

Plaintiff has also argued that the challenged ordinance violates the due process clause because it creates an irrebuttable presumption that a person convicted of a specified offense is forever unfit to be entrusted with a public chauffeur's license. Judge Campbell, who files a separate opinion concurring in the result, would decide the case on this ground, because of his concern that the equal-protection deficiency in the ordinance can readily be remedied by the city, and, if it is, we will soon be faced with another case raising the due process issue. We cannot predict whether the city will amend the ordinance to retain an absolute bar to employment as a public chauffeur which it has not seen fit to apply to any other occupation, no matter how sen-

sitive.<sup>1</sup> In any event, the equal-protection ground disposes of the case before us, and we are unwilling to plunge unnecessarily into the thicket of irrebuttable presumptions, for reasons which we can summarize as follows.

The irrebuttable presumption doctrine, invoked by the Supreme Court in several recent cases,<sup>2</sup> has its roots in the era when substantive due process concepts led the Court to strike down state and federal economic and social legislation it deemed arbitrary or capricious.<sup>3</sup> The renaissance of the doctrine has been fatal to state laws

<sup>1</sup> Briefs filed by *amici curiae* (Illinois Department of Corrections, Operation Dare, Just Jobs, Chicago Council of Lawyers, and John Howard Association) urge that the policy of absolute preclusion is inconsistent with state-imposed qualifications for other more sensitive occupations, fails to take account of experience showing the possibility of rehabilitation, is unnecessary for the protection of the public, and removes from the limited number of employment opportunities realistically available to ex-offenders that of taxicab or bus driver. While we are not unsympathetic to these public-policy arguments, they are more appropriately addressed to the legislative branch and can be when consideration is given to amending the ordinance we hold invalid.

<sup>2</sup> *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). Cf. *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Two previous decisions, *Bell v. Burson*, 402 U.S. 535 (1971), and *Carrington v. Rash*, 380 U.S. 89 (1965), have been explained as resting, at least in part, upon the same rationale. *Stanley v. Illinois*, *supra*, 405 U.S. at 653-656.

<sup>3</sup> In *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926), the Court, per Mr. Justice McReynolds, held a Wisconsin estate tax statute unconstitutional, because its provision that all transfers for less than adequate consideration made within six years of death be deemed gifts in contemplation of death violated the due process and equal protection clauses, in that gifts "in fact made without contemplation [of death] are . . . conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated." 270 U.S. at 240. In *Heiner v. Donnan*, 285 U.S. 312 (1932), the Court, per Mr. Justice Sutherland, overturned a similar federal estate tax provision as "so arbitrary and

(Footnote continued on following page)

regulating residency for purposes of voting rights<sup>4</sup> and college tuition,<sup>5</sup> driver's license suspension,<sup>6</sup> child custody,<sup>7</sup> and pregnancy disability.<sup>8</sup> Federal regulations concerning food stamp eligibility were also held unconstitutional on the same rationale.<sup>9</sup> In all these cases the legislative classifications were judged by balancing the advantages and feasibility of individualized determinations against the inflexibility and consequent harshness of the classification. In each case the Court struck down the classification established, and required an individualized factual determination into the eligibility of the plaintiff for the benefits or penalties attendant upon membership in the class. It did not,

<sup>3</sup> continued

capricious as to cause it to fall before the due process of law clause of the Fifth Amendment. . . ." 285 U.S. at 326. This was so because "the presumption here created . . . is made definitely conclusive—incapable of being overcome by proof of the most positive character." 285 U.S. at 324. In both cases the Court referred to earlier decisions discussing the due process implications of conclusive evidentiary presumptions. *Bailey v. Alabama*, 211 U.S. 452 (1908); *Bailey v. Alabama*, 219 U.S. 219 (1911); *Keller v. United States*, 213 U.S. 138 (1909); and *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35 (1910).

<sup>4</sup> *Carrington v. Rash*, 380 U.S. 89 (1965).

<sup>5</sup> *Vlandis v. Kline*, 412 U.S. 441 (1973).

<sup>6</sup> *Bell v. Burson*, 402 U.S. 535 (1971).

<sup>7</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>8</sup> *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

<sup>9</sup> *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973). The doctrine may also have been the basis, in part at least, for the Court's decision in *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Although the Chief Justice authored that opinion, and has been critical of the irrebuttable presumption doctrine, the Court's discussion at 417 U.S. 636-638 certainly echoes the earlier cases. In fact, Mr. Justice Blackmun's opinion for the Court in *Mathews v. Lucas*, 96 S.Ct. 2755 (1976), distinguishes *Jimenez* as involving conclusive presumptions. 96 S.Ct. at 2765.

however, forbid consideration of the factors behind the classification in making that determination.<sup>10</sup>

The irrebuttable presumption analysis has been criticized from its inception.<sup>11</sup> Mr. Justice Holmes pointed out that the creation of a conclusive presumption is simply an enactment of a rule of substantive law.<sup>12</sup> The Court's more recent invocations of the doctrine have been criticized within<sup>13</sup> and without<sup>14</sup> the Court.

<sup>10</sup> See *Vlandis v. Kline*, 412 U.S. 441, 452-454 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 nn. 13 & 14 (1974).

<sup>11</sup> See Mr. Justice Holmes' dissent in *Schlesinger v. Wisconsin*, *supra*, 270 U.S. at 241, and Mr. Justice Stone's dissent in *Heiner v. Donnan*, *supra*, 285 U.S. at 332.

<sup>12</sup> *Keller v. United States*, 213 U.S. 138, 149 (1909) (dissent); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (dissent).

<sup>13</sup> Mr. Justice Rehnquist has characterized the doctrine as relying "heavily on notions of substantive due process that have been authoritatively repudiated," *Vlandis v. Kline*, *supra*, 412 U.S. at 463, and as "in the last analysis nothing less than an attack upon the very notion of law-making itself." *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 660. The Chief Justice has criticized the doctrine since *Stanley v. Illinois*, 405 U.S. 645, 662 (1972), and Mr. Justice Powell expressed concern "about the implications of the doctrine for the traditional legislative power to operate by classification." *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 652 (concurring opinion).

<sup>14</sup> See Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 Ind. L. Rev. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 Stan. L. Rev. 449 (1975). But see Simson, *The Conclusive Presumption Cases: The Search For A Newer Equal Protection Continues*, 24 Cath. L. Rev. 217 (1975). Besides pointing out that few, if any, legislative classifications would survive the consistent application of the doctrine, the commentators have complained that the Court has never explained what prompted it to invoke the doctrine in some cases but not in others.

While *Weinberger v. Salfi*, 422 U.S. 749 (1975), authored by Mr. Justice Rehnquist, might be viewed as a major step back from the doctrine,<sup>15</sup> we cannot say that the doctrine has lost the support of a majority of the Court because it has been invoked subsequent to *Salfi* to strike down a Utah statute, *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), and to distinguish in *Mathews v. Lucas*, 96 S.Ct. 2755, 2765 (1976), the earlier *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Yet in sustaining a state compulsory-retirement-for-age statute in *Massachusetts Board of Retirement v. Murgia*, 95 S.Ct. 2562 (1976), last June, the Court made no reference to the doctrine.<sup>16</sup>

In summary, we cannot say whether the irrebuttable presumption doctrine or the substitute analysis followed in *Salfi*<sup>17</sup> would be thought appropriate for this case by a majority of the Supreme Court. Inasmuch as our

<sup>15</sup> It was said that, if extended, the irrebuttable presumption doctrine of the prior cases could become

"a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." 422 U.S. at 772.

<sup>16</sup> An omission which is particularly striking in light of Mr. Justice Rehnquist's dissent in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 659 (1974), advertent specifically to the effect of the irrebuttable presumption doctrine on mandatory retirement statutes.

<sup>17</sup> "The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." 422 U.S. at 777. (Emphasis supplied.) This approach to the problem of individual fairness when the legislature operates by classification appears to be consistent with the emphasis in *Vlandis v. Kline*, 412 U.S. 441, 452-454 (1973), upon the "reasonable alternative means of making the crucial determination" available to Connecticut. Cf. *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951).

equal-protection holding decides the case, it is unnecessary to reach the more difficult due process question.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CAMPBELL, *Concurring*.

Plaintiff's complaint challenged the constitutionality of Ch. 28.1-3 and defendant's conduct pursuant thereto, contending that the ordinance "deprives persons of a right to employment and to earn a living without due process of law", in violation of the Due Process Clause of the Fourteenth Amendment, and that it "singles out a class of persons for denial of access to a governmentally-established prerequisite to employment by denying public chauffeur's licenses to persons convicted of certain crimes," in violation of the Equal Protection Clause of the Fourteenth Amendment.

The District Court granted defendant's motion to dismiss on the ground that there existed a rational relationship between the classification (persons convicted of a crime involving the use of a deadly weapon) and the goal which the ordinance seeks to achieve (the protection of the public). Accordingly, the court held that the ordinance did not violate the Equal Protection Clause. In addition, the court held that the automatic exclusion of all persons convicted of a crime involving the use of a deadly weapon did not violate the Due Process Clause, holding that the "test of the appropriateness of the classification is whether it has a reasonable relationship to the goals sought to be attained."

On appeal, plaintiff contends that the ordinance creates an irrebuttable presumption of unfitness, barring issuance of a chauffeur's license irrespective of evidence to the contrary and thus deprives him of any opportunity for a meaningful hearing. He also contends that the ordinance violates the Equal Protection Clause

of the Fourteenth Amendment in two respects: (1) that the ordinance unconstitutionally discriminates against applicants previously convicted of a crime involving use of a deadly weapon, as against all other persons; and (2) that the distinction in treatment afforded ex-offender applicants, on the one hand, and licensees convicted of such offenses subsequent to issuance of the license, on the other, is irrational. The majority would resolve this appeal solely on the basis of plaintiff's second equal protection argument, holding that:

"Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment."

While I agree fully with this conclusion, I respectfully suggest that the remaining contentions advanced by plaintiff should also be addressed and resolved by this Court. If the only constitutional deficiency of this ordinance were the fact that it irrationally distinguishes between certain ex-offender applicants and those who are convicted of certain crimes subsequent to the issuance of a license (affording the latter, but not the former, an opportunity for a meaningful hearing), that deficiency easily could be cured by amending the ordinance so as to provide for the automatic revocation of any license held by a person who, subsequent to issuance

thereof, is convicted of certain felony offenses. Upon passage of such an amendment and the continued refusal to afford this plaintiff a *meaningful* hearing (i.e., one at which the result is not preordained by an irrebuttable presumption of unfitness), I would anticipate Mr. Miller's return to the district court to challenge the constitutionality of the ordinance on the remaining grounds heretofore advanced in the district court and again on appeal. In view of the realistic possibility that this would occur, and in the interest of avoiding unnecessary litigation, I believe the due process issue, as well as the remaining equal protection issue, should be resolved at this time.

#### EQUAL PROTECTION

Plaintiff argues that the ordinance, on its face, discriminates against one group of persons—those previously convicted of a crime involving the use of a deadly weapon—as against all other persons and as against other ex-offenders.<sup>1</sup>

In order to assess this aspect of plaintiff's equal protection claim, it is of course necessary first to determine the appropriate standard by which the constitutionality of the ordinance should be measured. Plaintiff urges that his right to work is such a fundamental right that the classification provided for in the ordinance should be tested against a constitutional standard of "strict scrutiny," and upheld only if found to be necessary to promote a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The defendant, on the other hand, argues that the legislative classification under consideration does not interfere with the exercise of any fundamental rights, and should be measured against the test of rationality set forth in *Dandridge v. Williams*, 397 U.S. 471 (1970), wherein the

<sup>1</sup> In this latter respect, plaintiff notes that the ordinance allows issuance of a public chauffeur's license to certain other ex-offenders whose convictions pre-date application for such a license by more than eight years. In addition, persons convicted of certain other felonies may be issued a license irrespective of the date of conviction, if they have been honorably discharged from a branch of the Armed Services in the interim.

Court held that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all . . . It is enough that the State's action be rationally based and free from invidious discrimination." 397 U.S. at 486-487.

The strict scrutiny test, requiring that a legislative classification be upheld only if it is necessary to advance a compelling state interest, will be used to measure the constitutionality of a legislative classification "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement v. Murgia*, ... U.S. ...., 49 L. Ed. 2d 520, 524, 96 S. Ct. (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Included among such fundamental rights are those protected by the First Amendment, such as the right of individuals to associate for the advancement of political beliefs, *Williams v. Rhodes*, 393 U.S. 23 (1968), and at least to some extent the right of personal privacy, *Roe v. Wade*, 410 U.S. 113 (1973). Also viewed as "fundamental" are the right to vote, *Bullock v. Carter*, 405 U.S. 134 (1972) and the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969). I am not persuaded, however, that the right to employment in a particular field of endeavor is "fundamental" in a sense which requires application of the strict scrutiny rule. Of particular note is the Supreme Court's recent decision in *Massachusetts Board of Retirement v. Murgia*, *supra*, wherein the Court found "no support to the proposition that a right of governmental employment *per se* is fundamental." In *Murgia*, the Court refused to apply the strict scrutiny rule to a mandatory retirement statute which required that state police officers retire at age fifty, and upheld the constitutionality of the statute under the Equal Protection Clause on the ground that the classification was rationally related to a legitimate state objective:

"[T]he State's classification rationally furthers the purpose identified by the State: Through mandatory retirement at age 50, the legislature seeks to protect

the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age." .... U.S. at .... 49 L.Ed.2d at 525-526.

Nor do I believe the strict scrutiny rule should be applied on the ground that the legislative classification operates to the peculiar disadvantage of a "suspect class". Indicative of classifications which have been strictly scrutinized on the ground that they affect a "suspect class" are those based upon race: *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); alienage: *Graham v. Richardson*, 403 U.S. 365 (1971); ancestry or nationality: *Oyama v. California*, 332 U.S. 633 (1948) and possibly, sex: *Frontiero v. Richardson*, 411 U.S. 677 (1973).<sup>2</sup>

<sup>2</sup> In *Frontiero*, the Court held unconstitutional a statutory scheme which required that, in order to claim a spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits, a female member of the armed services had to establish that she contributed to over one-half of her husband's support. The same statutory scheme allowed a serviceman to claim his wife as a "dependent" without regard to whether she, in fact, was dependent upon him for any part of her support. The Opinion of the Court was authored by Justice Brennan on behalf of himself and Justices Douglas, White and Marshall. Justice Stewart's brief concurrence agreed "that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed v. Reed*, 404 U.S. 71". Chief Justice Burger and Justice Blackmun joined in an opinion authored by Justice Powell concurring in the judgment but expressing the view that "it is unnecessary for the Court in this case to characterize sex as a suspect classification with all of the far-reaching implications of such a holding. *Reed v. Reed*, 404 U.S. 71 . . . which abundantly supports our decision today did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale." 411 U.S. at 691-692. It thus remains less than clear whether sex is a "suspect class" for the purpose of applying the strict scrutiny test. See, *Kahn v. Shevin*, 416 U.S. 351 (1974); *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 and Brennan J., dissenting at 497-505, *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7, 13 (1975), *Craig v. Boren*, 45 LW 4057 (1976).

The Supreme Court has noted that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez, supra*, at 28. *Murgia, supra*. Admittedly, significant societal disabilities often derive solely from the fact that a person is an ex-offender, particularly in the area of employment opportunities. Nevertheless, the Supreme Court decisions which have considered expanding the category of "suspect" classifications have shown a clear reluctance to do so. See, for example, the concurring opinions of Justices Stewart and Powell, expressing the views of four members of the Court, in *Frontiero*, and the Court's recent decision in *Murgia*, in which the Court declined an opportunity to include the aged as a "suspect class", notwithstanding the Court's acknowledgement that "the treatment of the aged in this Nation has not been wholly free of discrimination . . ." Accordingly, I would not deem ex-offenders to constitute a "suspect class" for purposes of the Equal Protection Clause, and would hold the strict scrutiny rule inapplicable.

It follows that the constitutionality of the ordinance under the Equal Protection Clause does not hinge on whether or not the statute is necessary to promote a compelling governmental interest. The defendant need only establish that the classification is rationally related to a legitimate legislative purpose. I believe that standard has been satisfied in this case.

Clearly, the City of Chicago has a legitimate interest in promoting public safety, and in this connection, may regulate the issuance of public chauffeur's licenses so as to better insure that the character and competence of the licensee is consistent with the high standards traditionally imposed upon common carriers with respect to the care and safety of public passengers. As the defendant correctly argues, persons who choose to be transported in taxicabs obviously are unable to make an informed choice in selecting the driver, and therefore are entitled to assume that, having been licensed by the

City, the licensee is a person of satisfactory character and competence. No doubt the City of Chicago has a legitimate interest in attempting to insure that public chauffeur licensees are persons of good character, are capable of being entrusted with the operation of a public passenger vehicle.

There is also a rational basis for considering an applicant's prior criminal record in determining whether he is a person of good character, worthy of being entrusted with the responsibilities of a public chauffeur. The past conduct of an applicant may be the best indicator of his present character and his future actions. As the *amicus curiae* brief filed in appellant's behalf by the Chicago Council of Lawyers and the John Howard Association concedes, well over 60% of those arrested for the commission of crimes nationally are ex-offenders.

Accordingly, the distinction drawn between ex-offenders and other applicants for public chauffeur's licenses is rationally related to a legitimate legislative goal, and therefore does not contravene the Equal Protection Clause.<sup>3</sup> I would also reject plaintiff's contention that the ordinance unconstitutionally distinguishes between those convicted of crimes involving the use of a weapon and ex-offenders convicted of certain other offenses. (The ordinance prohibits absolutely the issuance of a public chauffeur's license to the former, but allows under certain circumstances issuance of a license to the latter). Defendant's principal concern in considering the past criminal record of an applicant is the prospect of a driver placing a passenger in physical jeopardy. Accordingly, the ordinance gives greater weight to crimes such as armed robbery and rape than to crimes not involving violence and crimes not directed against other persons. If anything, this added specificity

<sup>3</sup> Nor do I believe, as plaintiff contends, that *Reed v. Reed*, 404 U.S. 71 (1971) created a new and more stringent equal protection standard in cases which do not require application of the strict scrutiny rule. *Reed* evidences no intention to deviate from the rationality standard, except perhaps in sex discrimination cases, which may well involve a "suspect class". See, n. 4, *supra*.

supports the constitutionality of the statute by more narrowly defining the class of persons to whom public chauffeur's licenses may not issue.

#### DUE PROCESS

In *Freitag v. Carter*, 489 F. 2d, 1377 (7th Cir., 1973), this Court held that a governmental licensing body which judges the fitness of an applicant for a public chauffeur's license must, as a matter of due process, afford the applicant adequate notice and a hearing. Freitag held that the applicant was entitled to a hearing and an opportunity to present evidence of his present mental condition, notwithstanding an investigation which showed that, some fourteen years earlier, the applicant had been a patient at a state mental hospital.

In the instant case, plaintiff contends that the absolute bar against issuance to him of a public chauffeur's license on the ground that he was previously convicted of a crime involving the use of a deadly weapon deprives him of rights guaranteed under the Due Process Clause of the Fourteenth Amendment. Plaintiff correctly argues that any hearing held upon his application for a public chauffeur's license would be utterly meaningless, since his status as an ex-offender stands as an absolute bar to the issuance of a license, notwithstanding the amount and/or quality of evidence attesting to his present good character. Thus, plaintiff argues that the ordinance creates an unconstitutional irrebuttable presumption that he is a person of unsatisfactory character, depriving him of any opportunity for a meaningful hearing and thereby denying him due process of law.

The defendant argues that the plaintiff was not deprived of either his "liberty" or "property", and that accordingly, he was not deprived of procedural due process of law by the City's failure to provide a hearing. Defendant's contention in this respect is based primarily on *Board of Regents v. Roth*, 408 U.S. 564 (1972), wherein the Court held that an untenured professor who had been hired for one year, following which he was informed that he would not be rehired for the next year,

was not deprived of either liberty or property under the Due Process Clause, and therefore was not entitled to a hearing.

I believe the Court in *Roth* sufficiently distinguished the facts of that case from instances involving the issuance or nonissuance of a license, the absence of which forecloses the applicant from an entire range of employment opportunities. *Board of Regents v. Roth*, *supra* at 574; *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). In addition, defendant's contention is implicitly rejected by this Court's decision in *Freitag*, *supra*.

Consideration of plaintiff's "irrebuttable presumption" argument requires a brief review of the leading, and in some instances, apparently inconsistent case law in this area. In *Bell v. Burson*, 402 U.S. 535 (1971), the Court held unconstitutional a Georgia statute which provided that an uninsured motorist's driver's license would be suspended if he became involved in an accident resulting in damage, and would remain suspended until liability had been determined. The statute did not provide for any hearing procedure under which the driver might avoid suspension of his license by presenting evidence of non-liability for the damage caused in the accident. The Court held that the failure to provide such a hearing deprived uninsured motorists due process of law. While *Bell* does not use the term "irrebuttable presumption", it clearly mandates a "meaningful hearing" at which the licensee might establish his non-liability. "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision" would not be a meaningful hearing. 402 U.S. at 542.

The following year, the Court decided *Stanley v. Illinois*, 405 U.S. 645 (1972), holding unconstitutional an Illinois statute which served absolutely to deprive an unwed father of custody of his illegitimate child. Although the law of Illinois provided that a parent could not be denied custody without notice, a hearing, and proof of parental unfitness, unwed fathers were conclusively presumed to be unfit, and therefore were not afforded a hearing. In holding the statute unconstitutional, the Court stated:

"It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children." 405 U.S. at 654-655.

The *Stanley* Court rejected Illinois' argument that it should not be required to undergo the inconvenience of a hearing because unwed fathers are so seldom fit and proper parents.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the constitution recognizes higher values than speed and efficiency . . .

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." 405 U.S. at 656-657.

A year later the Court decided *Vlandis v. Kline*, 412 U.S. 441 (1973) and *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973). In *Vlandis*, the Court held unconstitutional a Connecticut statute which, in determining the tuition to be paid by students enrolled at a state university, classified as permanent non-residents all unmarried students who had legally resided outside of Connecticut within twelve months prior to applying for admission. Relying on *Stanley*, the Court held that:

"The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised. In the situation before us, reasonable alternative means for determining bona fide residence are available." 412 U.S. at 451.

In *Murry*, the Court held unconstitutional Section 5(b) of the Food Stamp Act, 7 U.S.C. Section 2014(b) which, in effect, denied food stamp eligibility to any household containing a person eighteen years or older who had been claimed as a "dependent" for federal income tax purposes within the preceding twelve months by a person not eligible for food stamp relief. The Supreme Court agreed with the District Court's conclusion that the Act created "an irrebuttable presumption contrary to fact."

Consistent with the aforementioned decisions, the Court subsequently decided *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). In *LaFleur*, the Court held unconstitutional a maternity leave rule requiring a pregnant teacher to commence maternity leave five months prior to the expected birth of her child, and precluding re-employment prior to three months following birth. The Court held that the principles enunciated in *Stanley* and *Vlandis* were controlling, and that "the conclusive presumption embodied in these rules, like that in *Vlandis*, is neither 'necessarily [nor] universally true', and is violative of the Due Process Clause." 414 U.S. at 346.

More recently, the Court again applied the "irrebuttable presumption" rule, holding unconstitutional a Utah statute which rendered pregnant women ineligible for unemployment benefits for a period extending from twelve weeks before the expected date of childbirth until six weeks following childbirth: "The presumption of incapacity and unavailability for employment created by the challenged provision is virtually identical to the presumption found unconstitutional in" *LaFleur*. Thus, the Court concluded "that the Utah unemployment com-

pensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the *LaFleur* case." *Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975).

Balanced against the foregoing authorities are cases involving mandatory retirement statutes and the Supreme Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975). In *McIlvaine v. Pennsylvania*, 415 U.S. 986 (1975), the Court dismissed, for want of a substantial federal question, an appeal from the Pennsylvania Supreme Court which upheld a state law requiring retirement of police at age sixty. *McIlvaine* was quickly interpreted as upholding the constitutionality of mandatory retirement statutes against equal protection and due process claims. Thus the Second Circuit in *Rubino v. Ghezzi*, 512 F. 2d 431 (2nd Cir., 1975) affirmed the District Court's refusal to convene a three judge district court in an action challenging a state statute requiring retirement of judges at age seventy. The *Rubino* Court held that "the issues of equal protection and due process [irrebuttable presumption] were before the Court in *McIlvaine* and . . . the Supreme Court did not consider those issues to present a substantial federal question." 512 F. 2d at 433.

The Sixth Circuit followed *Rubino* in *Talbot v. Pyke*, 533 F. 2d 331 (1976) affirming summary judgment in defendant's favor in an action challenging an Ohio statute requiring retirement at age seventy.

In this circuit, the issue was presented in *Gault v. Garrison*, 523 F. 2d 205 (1975) in which a tenured school teacher was forced to retire at age sixty-five pursuant to school board policy. Plaintiff challenged the policy on equal protection grounds and as an irrebuttable presumption in violation of the Due Process Clause. In *Gault*, this Court took note of the Supreme Court's dismissal "for want of substantial federal question" of the appeal in *McIlvaine*. It was further noted that a three judge district court in *Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), had held that the dismissal for want of a substantial federal question in *McIlvaine* required

dismissal of a constitutional challenge made by plaintiff *Weisbrod*, a HUD attorney, to a Federal law mandating retirement at age seventy. The Supreme Court summarily affirmed. *Weisbrod v. Lynn*, 420 U.S. 940 (1975).

The *Gault* Court recognized that if *Weisbrod* and *McIlvaine* were to be considered binding precedents, they would not be distinguishable from the *Gault* case. However, the Court declined to resolve the merits of the case, and stayed further proceedings pending the Supreme Court's decision in *Massachusetts Board of Retirement v. Murgia*, with respect to which the Supreme Court had recently noted probable jurisdiction. 421 U.S. 974 (1975). The hope, obviously, was that the Supreme Court in *Murgia* would resolve the due process question presented by plaintiff *Gault*—i.e., whether a mandatory retirement statute creates an unconstitutional irrebuttable presumption that, because of age, the employee is unable to continue to adequately perform the services for which he has been hired.

As did the panel in *Gault*, we also awaited the Supreme Court's decision in *Murgia*, hoping that further light might be shed on the constitutionality of statutes creating irrebuttable presumptions, particularly in view of the Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), discussed *infra*, upholding the constitutionality of a statute which quite obviously creates an irrebuttable presumption and forever excludes certain persons from receiving certain benefits under the Social Security Act.

On June 25, 1976, the Supreme Court decided *Murgia*, without discussing the constitutionality of mandatory statutes under the Due Process Clause, and without characterizing the statute, requiring retirement of Massachusetts State Police at age fifty, as creating an irrebuttable presumption that officers over the age of fifty are physically unable adequately to perform the duties of a Massachusetts state police officer. The *Murgia* Court upheld the constitutionality of the statute in question solely on equal protection grounds holding that the strict scrutiny rule was not applicable, that the

statute was designed to achieve a legitimate legislative purpose and that the classification was rationally related to the achievement of that purpose.

In the interim, the Court decided *Weinberger v. Salfi*, 422 U.S. 749 (1975), upholding the constitutionality of a provision of the Social Security Act which defined "widow" and "child", for the purpose of survivor's benefits to exclude the widow or step-child of any deceased wage earner who had been the husband or step-father of the claimant for a period of less than nine months at the time of death. The stated purpose of the rule was to discourage sham marriages designed to enable one spouse to claim benefits upon the anticipated early death of the wage earner. The *Salfi* Court held that:

"The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justify the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard." 422 U.S. at 777.

In reaching this conclusion, the Court placed a heavy emphasis on the fact that "social welfare legislation" was involved, requiring broader discretion in the use of legislative classifications in order to maximize the use of available funds and resources. Thus, the Court quoted extensively from its prior decisions in *Flemming v. Nester*, 363 U.S. 603, 611 (1960),<sup>4</sup> *Dandridge v. Williams*, 397 U.S. 471, 485 (1970),<sup>5</sup> *Richardson v.*

<sup>4</sup> "Particularly when we deal with a withholding of a non-contractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." 363 U.S. at 611.

<sup>5</sup> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." 397 U.S. at 485.

*Belcher*, 404 U.S. 78, 81 (1971)<sup>6</sup> and *Geduldig v. Aiello*, 417 U.S. 484 (1974). Consistent with its emphasis that the claim in *Salfi* was distinguishable because social welfare legislation was involved, the Court declined to follow *Stanley* and *LaFleur* on the ground that, unlike the claims asserted in those cases, *Salfi* involved:

"a non-contractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status, *Dandridge v. Williams*, *supra*, though of course Congress may not invidiously discriminate among such claimants on the basis of a 'bare congressional desire to harm a politically unpopular group,' *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, . . . (1973), or on the basis of criteria which bear no rational relation to a legitimate legislative goal. *Jimenez v. Weinberger*, 417 U.S. 628, . . . (1974); *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508, . . . (1973)." 422 U.S. at 772.

The Court distinguished *Vlandis* on the ground that "the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772.

I find some difficulty in so easily distinguishing *Jimenez v. Weinberger*, 417 U.S. 628 (1974), wherein the Court declared unconstitutional a provision of the Social Security Act which, in effect, precluded an illegitimate child born after the onset of the parent's disability, from obtaining disability benefits, unless the child were eligible under other provisions of the Act regarding legitimization, inheritance or defective marriage ceremonies. The *Jimenez* Court concluded that the purpose of the statutory scheme was to prevent spurious claims and insure that only those actually entitled to disability benefits received such payments. The Court, distinguishing *Dandridge* on the ground that the purpose of

<sup>6</sup> "A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination' . . ." 404 U.S. at 81.

the legislative provision in *Jimenez* did not concern the allocation of finite resources, gave considerable weight to the fact that the classification created an irrebuttable presumption, noting that the dilemma of noneligible illegitimate children "is compounded by the fact that the statute denies them any opportunity to prove dependency in order to establish their 'claim' to support and, hence, their right to eligibility." 417 U.S. at 635. In this respect, the Court noted that:

"It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimants, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits . . .". 417 U.S. at 636.

The Court concluded that "to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment." 417 U.S. at 637.<sup>7</sup>

Similarly, notwithstanding the Court's effort to distinguish them, the *Salfi* decision is difficult to square with *Stanley*, *Vlandis* and *LaFleur*. The challenged provision in *Salfi* clearly creates an irrebuttable presumption, and in view of the Court's decisions in *Murry* and *Jimenez*, the fact that the Social Security Act is involved would not seem to be a wholly dispositive factor. Particularly with respect to *Vlandis*, the basis for distinction is difficult to comprehend. The Court seems to be saying that both the residency rule in *Vlandis* and the challenged provision in *Salfi* "speak in terms of the bona fides of the parties", but unlike the residency rule in *Vlandis*, the challenged provision in *Salfi* does

<sup>7</sup> For the same reasons, the *Salfi* decision is difficult to distinguish, on the basis of applicable legal principles, from the Court's decision in *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973).

not "make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772. But clearly, the statutory provision under consideration in *Salfi* did nothing less than preclude a widow, who married the deceased wage earner less than nine months prior to his death, from presenting evidence that the marriage was not a sham designed to enable one spouse to claim benefits upon the death of the other.

The extent to which the foregoing cases conflict with one another, and the extent to which the irrebuttable presumption rule has been criticized, leads the majority to conclude that

"we cannot say whether the irrebuttable presumption doctrine or the substitute analysis followed in *Salfi* would be thought appropriate for this case by a majority of the Supreme Court. Inasmuch as our equal-protection holding decides this case, it is unnecessary to reach the more difficult due process question."

As previously indicated, I believe it is necessary to resolve the due process issue, and would do so in plaintiffs' favor.

A careful reading of the *Salfi* decision suggests that present in that case were a combination of factors which might render application of the irrebuttable presumption rule inappropriate. First is the already discussed fact that the challenged provision was but a part of a comprehensive social welfare legislative scheme. Secondly, the Court noted that the "prophylactic approach" obviates the need to expend limited social welfare resources for the purpose of considering "large numbers of individualized determinations". The Court also recognized that the duration-of-relationship rule protects claimants, whose relationship with the deceased exceeded nine months, from the "uncertainties and delays of administrative inquiry into the circumstances of their marriages." Further, the Court noted that the very existence of the rule could discourage sham marriages. Finally, and perhaps most importantly, the Court recognized that it is not "at all clear that individual determinations could effectively filter out sham arrange-

ments, since neither marital intent, life expectancy, nor knowledge of terminal illness has been shown by appellees to be reliably determinable." 422 U.S. at 782-783.

This Court has already recognized the special status afforded social welfare legislation in the context of a classification which might otherwise be viewed as creating an unconstitutional irrebuttable presumption. *Fisher v. Secretary of U.S. Dept. of Health, Ed. and Welfare*, 522 F. 2d 493 (7th Cir., 1975).

In addition, some consideration must be given to the extent to which individualized determinations of eligibility would so burden the system as to substantially interfere with achievement of the legislative goal. In *Vlandis*, for example, the Court specifically noted that, as alternatives to the conclusive presumption in that case "there are other reasonable and practical means of establishing the pertinent facts on which the State's objective is premised." 412 U.S. at 451. Similarly, the *LaFleur* Court observed that "school boards have available to them reasonable alternative methods of keeping physically unfit teachers out of the classroom." 414 U.S. at 647, n. 14.

Thus, while "an interest in devising prompt and efficient procedures to achieve legitimate objectives . . ." will not suffice to justify classifications which constitute irrebuttable presumptions, *LaFleur, supra*, at 646,<sup>8</sup> it nevertheless would appear that a classification will not be held unconstitutional where individualized determinations of eligibility will necessarily and significantly interfere with the satisfactory operation of an overall legislative scheme. Such instances might well be limited to large and comprehensive social welfare programs,

<sup>8</sup> As the *Stanley* Court emphasized, the "Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." 405 U.S. at 656.

such as those encompassed under the Social Security Act, involving distribution of benefits to millions of claimants and requiring the promulgation of prophylactic rules concerning eligibility.

Finally, the *Salfi* Court emphasized that individual determinations might not effectively filter out sham marital arrangements. I think it is safe to say that in most other instances, adequate hearing procedures will advance, rather than retard, the fact-finding process.

Turning to the ordinance challenged by plaintiff Miller, none of the foregoing considerations are applicable. I therefore believe we should be guided by the Court's decisions in *Stanley*, *Vlandis* and *LaFleur*. Of particular significance is the fact that, subsequent to the decision in *Salfi*, the Court applied the irrebuttable presumption rule in holding a statutory provision unconstitutional. *Turner v. Dept of Employment Security*, 423 U.S. 44 (1975).

As in *Vlandis*, the hearing procedure which this Court required in *Freitag* offers a "reasonable and practical means of establishing the pertinent facts on which the [City's] objective is premised." 412 U.S. at 451. Moreover, the use of irrebuttable presumptions of ineligibility is particularly repugnant where they preclude an applicant from ever obtaining the credentials necessary to engage in a particular field of endeavor. The right to engage in a particular type of employment may not be a "fundamental right" for the purposes of the strict scrutiny test, but it is nevertheless a very important right, and one which should not be summarily denied through the use of irrebuttable presumptions of ineligibility. See, *Berger v. Board of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975).

Contrary to the defendant's contention, due process arguments based upon the presence of an irrebuttable presumption are not simply indirect efforts to attack a statute on equal protection grounds. Under the Equal Protection Clause, an unconstitutional classification may not be considered in determining eligibility. As indicated *supra*, the past criminal record of an applicant for a public chauffeur's license is a valid consideration

in determining the applicant's character and fitness. Due process considerations require only that the applicant be given a meaningful opportunity to present evidence of good character and fitness in contravention of any contrary inference based upon his prior conduct.

As does the majority, I fully recognize that, to say the least, this area of the law continues to evolve. On the one hand, decisions such as *Bell*, *Stanley*, *Vlandis*, *LaFleur* and *Turner* reflect a disdain for irrebuttable presumptions of ineligibility. On the other, the dissenting opinions in each of those cases and the Court's decision in *Salfi* suggest the unworkability of a rule forbidding all conclusive classifications. And as evidenced by the *Murgia* decision, the area involving perhaps the clearest use of conclusive presumptions—mandatory retirement—continues to be tested solely on traditional equal protection grounds. On the basis of what I understand to be the present state of the law, the ordinance in the instant case creates an irrebuttable presumption which deprives plaintiff of a meaningful hearing in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, I would reverse the judgment of the District Court both on the ground relied upon by the majority, and on the ground that the ordinance deprives the plaintiff of due process of law.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*

APPENDIX C

In the

**United States Court of Appeals  
For the Seventh Circuit**

January 25, 1977

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon.

Hon.

No. 75-1162

LUTHER MILLER,

*Plaintiff-Appellant,*

*v.*

JAMES Y. CARTER,

*Defendant-Appellee.*

---

Appeal from the United States District Court for the  
Northern District of Illinois Eastern Division.  
No. 74 C 2886

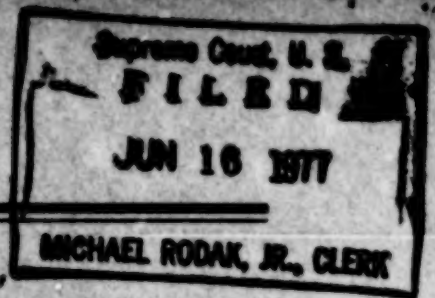
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This matter comes before the Court on the "MOTION FOR STAY OF MANDATE," filed herein on January 24, 1977 by counsel for the defendant-appellee. On consideration whereof,

IT IS ORDERED that the mandate of this Court be STAYED to and including February 24, 1977 in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

**APPENDIX**

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**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**No. 76-1171**

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**JAMES Y. CARTER, Public Vehicle License  
Commissioner of the City of Chicago,**

*Petitioner,*

**VS.**

**LUTHER MILLER, on his own behalf and on  
behalf of all others similarly situated,**

*Respondent.*

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**On Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit**

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**PETITION FOR CERTIORARI FILED FEBRUARY 24, 1977  
CERTIORARI GRANTED APRIL 18, 1977**

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**APPENDIX**

**CHRONOLOGICAL SCHEDULE OF  
RELEVANT DOCKET ENTRIES**

**IN THE UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division.**

**No. 74 C 2886**

- 10-8-74—Filed Complaint.
- 10-22-74—Filed Amended Complaint.
- 12-2-74—Filed Motion to Strike Plaintiff's Complaint and Dismiss the Plaintiff's Cause of Action.
- 12-2-74—Filed Brief and Memorandum in Support of Defendant's Motion to Strike Plaintiff's Amended Complaint and Dismiss Plaintiff's Cause of Action.
- 12-20-74—Filed Plaintiff's Notice of Filing and Memorandum in Opposition to Defense Motion to Strike and Dismiss.
- 1-20-75—Memorandum Opinion and Order entered by McGarr, J. granting Defense Motion to Strike and Dismiss.
- 2-12-75—Filed Plaintiff's Notice of Appeal.
- 2-19-75—Filed Plaintiff's Designation for Complete Record.
- 

**IN THE UNITED STATES COURT OF APPEALS  
For The Seventh Circuit**

**No. 75-1162**

- 3-3-75—Filed Record on Appeal.
- 3-24-75—Filed Appellant's Brief.

- 3-24-75—Filed Motion of the Illinois Department of Corrections, Operation Dare and Just Jobs for Leave to Appear as Amici Curiae and to File Brief Instantly.
- 3-25-75—Filed Motion of the Chicago Council of Lawyers and the John Howard Association for Leave to Appear as Amici Curiae and to File Brief Instantly.
- 3-26-75—Filed Amici Curiae Briefs.
- 4-24-75—Filed Appellee's Brief.
- 6-3-75—Oral argument heard. Cause taken under advisement.
- 1-4-77—Filed Per Curiam Opinion reversing and remanding to the District Court. Campbell, J., Concurring.
- 1-25-77—Entered Order granting Appellee's Motion for Stay of Mandate.

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IN THE SUPREME COURT OF THE UNITED STATES  
No. 76-1171

- 2-24-77—Petition for Writ of Certiorari filed by Defendant.
- 4-18-77—Order entered granting Writ of Certiorari.
- 

IN THE UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division

LUTHER MILLER, on his own behalf  
and on behalf of all others similarly situated,

Plaintiffs,

vs.

JAMES Y. CARTER, Public Vehicle  
License Commissioner,

Defendant.)

Civil Action

No. 74 C 2886

AMENDED COMPLAINT

1. This is a complaint brought by plaintiff Luther Miller, on his own behalf and on behalf of all others similarly situated, against defendant James Y. Carter, Public Vehicle License Commissioner, seeking to overturn the denial of a public chauffeur's license. Defendant has denied said license by enforcing a Chicago Municipal Ordinance which is repugnant to the Constitution of the United States. Said ordinance conclusively denies persons convicted of felonies and some misdemeanors public chauffeurs' licenses, in violation of the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs seek by way of a declaratory judgment that said ordinance violates the aforementioned rights guaranteed by the Constitution of the United States, an injunction enjoining enforcement of said ordinance, and other equitable relief.

2. This is a civil action authorized by 42 U.S.C. §1983 to redress the deprivation under color of state law of rights guaranteed by the Constitution of the United States.

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3), §1343(4), §§2201 and 2202.

4. Plaintiff Luther Miller is a citizen of the United States and a resident of the Northern District of Illinois. He is, and at all times relevant hereto has been, a resident of the City of Chicago, and a driver licensed to drive by the State of Illinois. He is further an ex-offender.

5. Defendant James Carter is the Public Vehicle License Commissioner of the City of Chicago. His office is created pursuant to Chapter 21-1 of the Municipal Ordinances of the City of Chicago and he is vested with sole authority to issue public chauffeur's licenses for public chauffeurs within the City of Chicago. He is sued individually and in his official capacity.

6. Plaintiff Miller was convicted in 1963 or 1964 in the State of Florida of a misdemeanor, to wit the unauthorized use of a motor vehicle and sentenced to 60 days in jail. Plaintiff was not represented by an attorney.

7. Plaintiff Miller was further convicted of armed robbery in August, 1965 in the Circuit Court of Cook County and sentenced to 7-12 years in the penitentiary. He was released from the Illinois State Penitentiary and placed on 18 months' parole in February, 1972.

8. In August, 1973, plaintiff Miller was discharged from parole by the Illinois Parole and Pardon Board, having satisfactorily fulfilled the terms of his parole agreement.

9. On September 6, 1974, plaintiff Miller went to the offices of defendant Carter and attempted to apply for a public chauffeur's license. Said license is an absolute prerequisite for persons who wish to be employed as public chauffeurs, pursuant to Chicago Municipal Ordinance 28.1,

entitled "Public Chauffeur" and appended hereto as Plaintiff's Exhibit A.

10. Plaintiff Miller was not allowed to apply for a public chauffeur's license by Mark O. Cooper, Administrative Assistant to defendant Carter. Cooper, a duly authorized agent of Carter, and a representative of the Public Vehicle License Commission, who was at all times herein relevant acting within the scope of his employment, cited plaintiff Miller's armed robbery conviction and Chapter 28 of the Chicago Municipal Ordinances in justifying his actions. (See Cooper's statement, appended hereto as Plaintiff's Exhibit B.)

11. Plaintiff Miller brings this action on his behalf and pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all persons denied, or to be denied, chauffeur's licenses by reason of having been convicted of a crime involving the use of a deadly weapon. The persons in the class are so numerous that joinder of all members is impracticable; the claims of the representative party are typical of the claims of the class; and the representative party will fairly and adequately protect the interests of the class. In addition, the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

12. It is the general and uniform practice of defendant Carter to either refuse to allow or to thereafter deny applications for public chauffeur's licenses to any and all members of the class plaintiff represents, pursuant to Ordinance 28-1-3, as shown by Plaintiff's Exhibit C appended hereto.

13. Defendant Carter has acted under color of law of the State of Illinois, and specifically under Chicago Municipal Ordinance 28-1-3, to deprive plaintiff and the members of the class of plaintiffs of rights secured by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. The Chicago Municipal Ordinance is repugnant to the Constitution of the United States and Section 1983 of title 42 of the United States Code in that:

a. It deprives persons of a right to employment and to earn a living without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

b. It imposes arbitrary, discriminatory and deliberately repressive treatment upon ex-offenders, who have already paid their debt to society, by extending punishment beyond the term imposed by the sentencing court and thereby causes ex-offenders to be permanently penalized for the commission of acts as to which Illinois law (Ill. Rev. Stat., Ch. 38, §1005-8-1 *et seq.*) has set a maximum sentence, in violation of the Eighth Amendment and Fourteenth Amendment to the Constitution of the United States.

c. It singles out a class of persons for denial of access to a governmentally-established prerequisite to employment by denying public chauffeur's licenses to persons convicted of certain crimes, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

d. It singles out for discriminatory treatment Blacks and other minorities, who statistically are convicted of crimes in excess of their percentage of the population of the City of Chicago and the State of

Illinois, with the result being that the denial of public chauffeur's licenses on the basis of conviction constitutes a form of discrimination on the basis of race, in violation of the Fourteenth Amendment to the Constitution of the United States and Section 1983.

14. Plaintiff and members of the class he represents have no plain, adequate or complete remedy at law to redress the wrongs alleged herein. This suit for declaratory judgment and injunctive and other equitable relief is their only means of securing adequate relief. Plaintiff and members of the plaintiff class are now suffering and will continue to suffer irreparable injury from the actions of the defendants, as set forth herein.

Wherefore, plaintiffs pray that this Court enter judgment granting plaintiffs:

a. A declaratory judgment that that portion of Chicago Municipal Ordinance 28-1-3, which denies issuance of public chauffeur's licenses to those persons convicted of a crime involving use of a deadly weapon, violates plaintiff's rights secured by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States, and that such ordinance is on its face unconstitutional.

b. A preliminary and permanent injunction enjoining the defendants from enforcing or implementing Chicago Municipal Ordinance 28-1-3.

c. A preliminary and permanent injunction requiring defendants to issue to plaintiff Miller a public chauffeur's license, and a preliminary and permanent injunction prohibiting defendants from denying issuance of a public chauffeur's license to members of plaintiff class solely because of conviction of a crime involving the use of a deadly

weapon, which acts as an automatic bar to issuance of said license, as set out in Chicago Municipal Ordinance 28-1-3.

d. Damages in the amount of wages lost from the date of plaintiff's application for a public chauffeur's license.

e. Reasonable attorney's fees and expenses.

f. Such other and further relief as this Court may find to be just and equitable.

Respectfully submitted,

/s/ Mark Jaffe  
Howard Eglit  
Roger Baldwin Foundation  
of ACLU, Inc.  
5 South Wabash, Room 1516  
Chicago, Illinois 60603  
312/726-6180

Robert Masur  
Legal Assistance Foundation  
of Chicago  
911 South Kedzie  
Chicago, Illinois 60612  
312/638-2343

Alan Freedman  
Woodlawn Law Office  
1105 East 63rd Street  
Chicago, Illinois 60637  
312/955-6300

Attorneys for Plaintiff.

## EXHIBIT "A" ATTACHED TO COMPLAINT

§§ 28.1-1 to 28.1-4

### CHAPTER 28.1

#### PUBLIC CHAUFFEURS

28.1-1. Definition	28.1-9. License Renewal
28.1-2. License required	28.1-10. Suspension—revocation
28.1-3. Application	28.1-11. Loitering
28.1-4. Character investigation	28.1-12. False information
28.1-5. Examination of applicant	28.1-13. Deadly weapons
28.1-6. Fingerprints and photograph	28.1-14. Address—notice of
28.1-7. Exhibition of license	28.1-15. Penalty
28.1-8. License—defacement—fee	

28.1-1. The definitions of the words "chauffeur" and "public passenger vehicle" in chapter 28 of this code apply to the same words when used in this chapter. [Passed. 12-20-51, Coun. J. p. 1601.]

Definition

28.1-2. It is unlawful for any person to drive a public passenger vehicle on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city without first having obtained a license as a public chauffeur. [Passed. 12-20-51, Coun. J. p. 1601.]

License required

28.1-3. Applications for public chauffeur licenses shall be made in writing to the commissioner upon forms provided by him therefor. They shall contain the full name and Chicago street address of the applicant and such other information as may be required by the commissioner to properly identify the applicant and disclose any information as to his character, reputation, physical qualifications, past employment and conduct which the commissioner deems relevant to the question of qualification of the applicant for a chauffeur's license.

Application

Every applicant shall be at least eighteen years old, a citizen or declarant of citizenship of the United States of America and the license of an Illinois state chauffeur's license. He shall be able to speak, read and write the English language, be of sound physique, have good sight, not be subject to epilepsy, vertigo, heart trouble or other infirmity of body or mind and not be addicted to the use of drugs or intoxicating liquors which may render him unfit to drive a public passenger vehicle.

No public chauffeur's license shall be issued to any person who has been convicted of a felony or any criminal offense involving moral turpitude within eight years prior to his application for such license, excepting only if such person shall have received, since the time of his conviction, an honorable discharge from any branch of the armed services of the United States of America, and if, in the discretion of the public vehicle license commissioner, such person is trustworthy of the responsibility imposed by the issuance of such license. No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape. (Passed. Coun. J. 12-20-51, p. 1601; amend. 5-20-70, p. 8621.)

28.1-4. The character and reputation of each applicant shall be investigated under the supervision of the captain of the police district in which the applicant resides, and a report of such investigation containing any facts relevant to the character and reputation of the applicant shall be forwarded by the captain to the commissioner of police, who shall forward the same to the commissioner together with his recommendation. If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license. Pending such investigation the commissioner may issue a temporary permit authorizing the applicant to drive a public passenger vehicle until the time designated in such permit. If the investigation is not completed by that time the commissioner may, in his discretion, extend the time of such permit until such further time as in the opinion of the commissioner the investigation can be completed. [Passed. 12-20-51, Coun. J. p. 1601.]

Character investigation

EXHIBIT "B" ATTACHED TO COMPLAINT

9/6/74

To Whom it may concern

MR. LUTHER MILLER CAN

Apply For Public Chauffeur

LICENSE BECAUSE OF

OK 28 Any one convicted

of Arson Robbery may

NOT apply

Non-Resident

744-5429

EXHIBIT "C" ATTACHED TO COMPLAINT

PUBLIC VEHICLE LICENSE COMMISSION  
CITY OF CHICAGO

A LICENSE CAN NOT BE ISSUED TO YOU IF YOU HAVE EVER BEEN  
CONVICTED OF:

- (A) Crime involving the use of a deadly weapon.
  - (B) Charge involving the use or selling of narcotics.
  - (C) Crime against nature, incest or rape.
  - (D) Felony (within the past eight (8) years).
- Definition of a FELONY: A crime or offense that is punishable by death sentence or by imprisonment in a penitentiary, such as: BURGLARY, LARCENY, ROBBERY, etc.

CITY INFORMATION TESTS

It must be understood that your knowledge of city streets, location of public buildings and your ability to use city directories are of prime importance if you are to become a PROFESSIONAL CHAUFFEUR. A multiple choice questionnaire will be given you. You will be required to answer 14 questions correctly. You will be permitted one test per day, if you fail the test you may take it on succeeding days.

Do not request help in answering these questions. If you can not answer 14 of these questions correctly, you are not ready to operate a taxicab on the streets of Chicago.

COPYING OF ANSWERS FROM OTHER APPLICANTS OR SUPPLYING ANSWERS WILL RESULT IN THE VOIDING OF YOUR TEST.

VISION AND HEARING

STANDARD TESTS WILL BE GIVEN BY TECHNICIAN. Tests may be taken with or without glasses. If test is taken with glasses, pictures submitted must show applicant wearing glasses. Dark or Sun Glasses will be accepted ONLY on presentation of doctors certificate indicating their necessity.

GENERAL

In the event you change your address after application is made, notify this office so that instructions, notifications, etc., can be forwarded to you without delay.

When your fingerprints are returned and evaluated, you will be notified at once by MAIL.

Applicants must furnish four (4) recent photographs, approximately 1-1/2 x 1-1/2 with 1" head. Pictures must have a white background; brown or tinted backgrounds will not be accepted. No hats or caps or scarfs will be worn in photographs.

INFORMATION MIS-STATED OR OMITTED WILL RESULT IN THE DENIAL OF YOUR APPLICATION. UNDER THESE CONDITIONS NO REFUNDS WILL BE MADE.

SAMPLE OF CITY INFORMATION TEST:

	#1	#2	#3
White Sox Park	#1. Addison & Clark St. - #2. Roscoe & Western. - #3. 35th & Wentworth.		X
City Hall	#1. Randolph & Clark. - #2. Clark & Madison. - #3. Washington & LaSalle.		X

USE "X's" for indicating your choice.

PUBLIC VEHICLE LICENSE COMMISSION  
CITY OF CHICAGO

ISSUANCE OF LICENSE

THE FEE FOR THIS LICENSE IS FIVE DOLLARS (\$5.00).

TO APPLICANTS FOR PUBLIC CHAUFFEUR LICENSE:-

In filing this application it must be remembered that this is an AFFIDAVIT and that all questions must be answered fully and correctly. If there is a doubt in your mind as to the meaning of a question, ASK THE EXAMINER.

When you have answered all the questions and sworn to the truth of your answers, the Examiner will notarize your application.

False statements or misrepresentation in your answers will result in a denial of your application. NO REFUNDS CAN BE MADE IN THESE CASES.

THE FEE FOR THIS LICENSE IS FIVE DOLLARS

FOLLOW THESE INSTRUCTIONS CAREFULLY:

Print your name - Last Name first. If your Illinois Drivers License carries a Middle Initial, use it when filling out this application. You must present Social Security Identification to Examiner. Enter Your Correct Address and Telephone Number.

THE MOST IMPORTANT STEP IN YOUR APPLICATION IS THE QUESTION:

"Have you ever been arrested for any offenses?" The accuracy with which you answer this question determines the EARLIEST DATE your license will be issued. If you OMIT, FORGET or FALSIFY on any arrest you may have had, you will be required to return to this office for an explanation of the error and the application must be sent back to the Police Department for further consideration. This means that the issuance of your license can be held up 7 to 10 days.

DEFINITION OF OFFENSES:- This means whenever you have been arrested and taken to a police station for any charge whatsoever or been brought in on a warrant, whether it was while you were serving in the armed forces or in a City, State or Country. These arrests must be listed with the approximate date of each, whether or not you were convicted and sentenced to serve time, discharged, released after interrogation, fined, placed on probation or given supervision. REMEMBER, TO SAVE TIME IN OBTAINING YOUR LICENSE, ANSWER THESE QUESTIONS COMPLETELY AND HONESTLY. Tickets received for traffic violations need not be listed, with the exceptions of: "Leaving the Scene of an Accident" and "Driving Under the Influence of Alcohol" arrests. If additional space is required to list your arrests, the Examiner will supply you with additional cards.

If you are in doubt of an offense that you were arrested for, request a check from the Examiner.

REMEMBER: FALSE STATEMENTS WILL RESULT IN DENIAL OF YOUR

LICENSE WITH NO REFUND OF YOUR \$5.00 fee.

*James Y. Carter*

EXHIBIT-C

IN THE UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division

LUTHER MILLER, on his own behalf  
and on behalf of all others similarly situated,

Plaintiffs,

vs.

JAMES Y. CARTER, Public Vehicle  
License Commissioner,

Defendant.

No. 74 C 2886

Judge  
McGarr

MOTION TO STRIKE PLAINTIFF'S COMPLAINT  
AND DISMISS PLAINTIFF'S CAUSE OF ACTION

Now comes the Defendant, James Y. Carter, by and through his attorney, Richard L. Curry, Corporation Counsel of the City of Chicago, and moves this Honorable Court to strike Plaintiff's Amended Complaint and dismiss its cause of action for the following reasons:

1. The Court lacks jurisdiction over the subject matter herein and the parties hereto.
2. The doctrine of *Respondent Superior* does not apply under the Civil Rights Act (42 U.S.C. § 1981 et seq.).
3. The Complaint fails to allege facts sufficient to state a claim for which relief may be granted.

Wherefore, for the foregoing reasons, the defendant, James Y. Carter, Public Vehicle License Commissioner of

the City of Chicago, moves this Honorable Court to strike the plaintiff's Amended Complaint and to dismiss plaintiff's cause of action.

Richard L. Curry, Corporation Counsel  
Of The City Of Chicago,

Attorney for James Y. Carter,  
Public Vehicle License Comr.,  
Defendant,

By /s/ Frank J. Dolan  
Assistant Corporation Counsel  
121 N. LaSalle Street, 60602  
Room 511, City Hall  
Chicago, Illinois  
Tel. 744-6910

IN THE UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division

LUTHER MILLER, et al.,

*Plaintiffs,*

vs.

JAMES Y. CARTER,

*Defendant.*

No. 74 C 2886

MEMORANDUM OPINION AND ORDER

Plaintiff has brought this suit as a class action seeking an injunction against enforcement of an allegedly invalid ordinance of the City of Chicago. His claim is asserted under 42 U.S.C. §1983 to redress the deprivation under color of state law, of rights guaranteed under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. The defendant has moved to dismiss the complaint.

The plaintiff, Luther Miller, was convicted in 1965 of armed robbery. After serving his sentence and fulfilling the conditions of his parole, on September 6, 1974, he attempted to apply for a public chauffeur's license. This license is an absolute prerequisite to employment as a public chauffeur, pursuant to Chicago Municipal Ordinance 28.1. Plaintiff was not allowed to apply by the Public Vehicle License Commission because of a provision of the above ordinance which denies such a license to anyone convicted of "a crime involving the use of a deadly weapon". Ch. 28.1-3. It is this provision which is challenged herein.

Plaintiff challenges the provision on the grounds that it is cruel and unusual punishment, that it violates his rights to due process in that it establishes an irrebuttable presumption, and that it violates his right to equal protection under the law. Since the ordinance is not meant to be a means of punishing offenders, there is no basis for concluding that it is violative of the Eighth Amendment. Furthermore, there is clearly a rational relationship between the classification created, those persons convicted of a crime involving the use of a deadly weapon, and the goal of this ordinance, the protection of the public who make use of public vehicles. cf. *Slaughter v. City of Chicago*, No. 71 C 2986, N.D. Ill., June 7, 1972. Therefore, there are no grounds for finding a violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff argues strenuously that this ordinance creates an irrebuttable presumption that persons who have been convicted of a felony involving the use of a deadly weapon are unfit to be entrusted with the responsibilities imposed upon holders of public chauffeur's licenses. While this is one way of regarding the ordinance, it does not help to focus the legal issue. The Supreme Court has upheld the use of a *per se* rule to exclude a class of persons from a certain occupation in *DeVeau v. Braisted*, 363 U.S. 144 (1960). The test of the appropriateness of the classification is whether it has a reasonable relationship to the goals sought to be attained. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). The ordinance in issue here meets that test.

Accordingly, defendant's motion to dismiss is granted.

Enter

Frank J. McGarr

United States District Judge

Dated: January 17, 1975

IN THE UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division

LUTHER MILLER,

Plaintiff,

vs.

JAMES Y. CARTER,

Defendant.

No. 74 C 2886

NOTICE OF APPEAL

Notice is hereby given that Luther Miller, plaintiff herein, appeals to the United States Court of Appeals for the Seventh Circuit from the order entered in this action on January 17, 1975.

The names of the parties of this order and the names and addresses of their respective representatives are: Luther Miller appellant herein, who is represented by Howard Eglit, Roger Baldwin Foundation of the ACLU, 5 South Wabash, Chicago, Illinois, 60603, Robert Masur, Legal Assistance Foundation of Chicago, 911 S. Kedzie, Chicago, Illinois, 60612 and Alan Freedman, Legal Assistance Foundation of Chicago, 1105 E. 63rd Street, Chicago, Illinois, 60637; James Y. Carter, who is represented by Frank J. Dolan and Melvyn L. Romanoff, Office of the Corporation Counsel, Room 511, Chicago City Hall, Chicago, Illinois, 60602.

Dated: February 11, 1975

/s/ Robert Masur

Attorney for Luther Miller,  
Plaintiff

Legal Assistance Foundation  
911 S. Kedzie Avenue  
Chicago, Ill. 60612

In the  
**United States Court of Appeals**  
For the Seventh Circuit

No. 75-1162

LUTHER MILLER, et al.,

*Plaintiffs-Appellants,*

v.

JAMES Y. CARTER,

*Defendant-Appellee.*

Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division  
No. 74 C 2886—Frank J. McGarr, Judge.

ARGUED JUNE 3, 1975—DECIDED JANUARY 4, 1977

Before TONE and BAUER, *Circuit Judges*, and  
CAMPBELL, *Senior District Judge*.\*

*Per Curiam.* The issue before us is whether a Chicago ordinance which permanently bars persons convicted of certain offenses from obtaining a public chauffeur's license violates the due process and equal protection clauses of the Fourteenth Amendment. The District Court sustained the ordinance. We reverse.

Plaintiff was convicted of armed robbery in 1965, when he was 20 years old, and, after serving seven years

\* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

in the Illinois State Penitentiary, was paroled in 1972. He satisfactorily completed his parole and was discharged in August 1973. In September 1974 he applied for a public chauffeur's license to qualify for employment as a taxicab driver. His application was refused on the ground of Chicago Municipal Ordinance, Ch. 28.1-3, which provides that such a license may not

"be issued to any person at any time after conviction of a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape."

Plaintiff thereupon filed this action for injunctive and declaratory relief. The motion of the defendant, the city's Public Vehicle License Commissioner, to dismiss the complaint was granted by the District Court, and judgment was entered in his favor.

Chapter 28.1-2 of the Chicago Municipal Ordinance requires that any person employed in "transporting . . . passengers for hire" have a public chauffeur's license. Applications for the license are made to the commissioner, who submits the name of an applicant to the captain of the police district in which the applicant resides for a "character and reputation" investigation. Ch. 28.1-4. After receiving the police captain's report, the commissioner rules on the application:

"If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license." Ch. 28.1-4.

The commissioner is prohibited, however, as we have seen, from issuing a license to any person convicted of certain crimes, including the one of which plaintiff was convicted. Persons convicted of felonies not listed in the passage quoted above, and of other crimes involving moral turpitude, are ineligible to apply for licenses for a period of eight years following conviction. Ch. 28.1-3.

In *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), this court held unconstitutional the Public Vehicle

License Commissioner's denial of an application for a public chauffeur's license under a clause of Ch. 28.1-3 which prevented the issuance of a license to any applicant "subject to . . . infirmity of . . . mind . . . which may render him unfit to drive a public passenger vehicle." We held that the due process clause of the Fourteenth Amendment required that a "governmental licensing body which judges the fitness of an applicant must afford that applicant adequate notice and a hearing." *Id.*, 489 F.2d at 1382. Such a hearing on plaintiff Luther Miller's application, however, would be a mere formality because of the prohibition in Ch. 28.1-3 against granting a license to one who has committed a crime involving the use of a deadly weapon.

In addition to the provisions previously discussed, the ordinance specifies standards of conduct required of licensees and sets penalties for violations of those standards. Ch. 28.1-10 through 28.1-15. Ch. 28.1-10 describes, as conduct which can lead to the revocation of a license, the violation of "any criminal law which, if convicted for such offense, would disqualify any applicant for a chauffeur's license. . . ." Engaging in this behavior does not, however, lead to automatic revocation. Rather, "the commissioner *may* recommend to the mayor that [the] license . . . be revoked and the mayor, *in his discretion, may* revoke such license." (Emphasis supplied.) Thus, plaintiff Miller is absolutely barred from obtaining a license, although he was convicted of armed robbery over eleven years ago, while someone who already holds a license may be permitted to retain it, although convicted of armed robbery only yesterday.

The city's purported justification for this different treatment of persons who commit one of the listed offenses after receiving a license is that they have a "track record" that the commissioner and mayor can balance against the felony in evaluating fitness. The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before

licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. Indeed, one who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would, according to the ordinance, also be eligible to retain the license, for under Ch. 28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation.

Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment.

Plaintiff has also argued that the challenged ordinance violates the due process clause because it creates an irrebuttable presumption that a person convicted of a specified offense is forever unfit to be entrusted with a public chauffeur's license. Judge Campbell, who files a separate opinion concurring in the result, would decide the case on this ground, because of his concern that the equal-protection deficiency in the ordinance can readily be remedied by the city, and, if it is, we will soon be faced with another case raising the due process issue. We cannot predict whether the city will amend the ordinance to retain an absolute bar to employment as a public chauffeur which it has not seen fit to apply to any other occupation, no matter how sen-

sitive.<sup>1</sup> In any event, the equal-protection ground disposes of the case before us, and we are unwilling to plunge unnecessarily into the thicket of irrebuttable presumptions, for reasons which we can summarize as follows.

The irrebuttable presumption doctrine, invoked by the Supreme Court in several recent cases,<sup>2</sup> has its roots in the era when substantive due process concepts led the Court to strike down state and federal economic and social legislation it deemed arbitrary or capricious.<sup>3</sup> The renaissance of the doctrine has been fatal to state laws

<sup>1</sup> Briefs filed by *amici curiae* (Illinois Department of Corrections, Operation Dare, Just Jobs, Chicago Council of Lawyers, and John Howard Association) urge that the policy of absolute preclusion is inconsistent with state-imposed qualifications for other more sensitive occupations, fails to take account of experience showing the possibility of rehabilitation, is unnecessary for the protection of the public, and removes from the limited number of employment opportunities realistically available to ex-offenders that of taxicab or bus driver. While we are not unsympathetic to these public-policy arguments, they are more appropriately addressed to the legislative branch and can be when consideration is given to amending the ordinance we hold invalid.

<sup>2</sup> *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). Cf. *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Two previous decisions, *Bell v. Burson*, 402 U.S. 535 (1971), and *Carrington v. Rash*, 380 U.S. 89 (1965), have been explained as resting, at least in part, upon the same rationale. *Stanley v. Illinois*, *supra*, 405 U.S. at 653-656.

<sup>3</sup> In *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926), the Court, per Mr. Justice McReynolds, held a Wisconsin estate tax statute unconstitutional, because its provision that all transfers for less than adequate consideration made within six years of death be deemed gifts in contemplation of death violated the due process and equal protection clauses, in that gifts "in fact made without contemplation [of death] are . . . conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated." 270 U.S. at 240. In *Heiner v. Donnan*, 285 U.S. 312 (1932), the Court, per Mr. Justice Sutherland, overturned a similar federal estate tax provision as "so arbitrary and

(Footnote continued on following page)

regulating residency for purposes of voting rights<sup>4</sup> and college tuition,<sup>5</sup> driver's license suspension,<sup>6</sup> child custody,<sup>7</sup> and pregnancy disability.<sup>8</sup> Federal regulations concerning food stamp eligibility were also held unconstitutional on the same rationale.<sup>9</sup> In all these cases the legislative classifications were judged by balancing the advantages and feasibility of individualized determinations against the inflexibility and consequent harshness of the classification. In each case the Court struck down the classification established, and required an individualized factual determination into the eligibility of the plaintiff for the benefits or penalties attendant upon membership in the class. It did not,

<sup>3</sup> *continued*

capricious as to cause it to fall before the due process of law clause of the Fifth Amendment. . . ." 285 U.S. at 326. This was so because "the presumption here created . . . is made definitely conclusive—incapable of being overcome by proof of the most positive character." 285 U.S. at 324. In both cases the Court referred to earlier decisions discussing the due process implications of conclusive evidentiary presumptions. *Bailey v. Alabama*, 211 U.S. 452 (1908); *Bailey v. Alabama*, 219 U.S. 219 (1911); *Keller v. United States*, 213 U.S. 138 (1909); and *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35 (1910).

<sup>4</sup> *Carrington v. Rash*, 380 U.S. 89 (1965).

<sup>5</sup> *Vlandis v. Kline*, 412 U.S. 441 (1973).

<sup>6</sup> *Bell v. Burson*, 402 U.S. 535 (1971).

<sup>7</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>8</sup> *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

<sup>9</sup> *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973). The doctrine may also have been the basis, in part at least, for the Court's decision in *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Although the Chief Justice authored that opinion, and has been critical of the irrebuttable presumption doctrine, the Court's discussion at 417 U.S. 636-638 certainly echoes the earlier cases. In fact, Mr. Justice Blackmun's opinion for the Court in *Mathews v. Lucas*, 96 S.Ct. 2755 (1976), distinguishes *Jimenez* as involving conclusive presumptions. 96 S.Ct. at 2765.

however, forbid consideration of the factors behind the classification in making that determination.<sup>10</sup>

The irrebuttable presumption analysis has been criticized from its inception.<sup>11</sup> Mr. Justice Holmes pointed out that the creation of a conclusive presumption is simply an enactment of a rule of substantive law.<sup>12</sup> The Court's more recent invocations of the doctrine have been criticized within<sup>13</sup> and without<sup>14</sup> the Court.

<sup>10</sup> See *Vlandis v. Kline*, 412 U.S. 441, 452-454 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 nn. 13 & 14 (1974).

<sup>11</sup> See Mr. Justice Holmes' dissent in *Schlesinger v. Wisconsin*, *supra*, 270 U.S. at 241, and Mr. Justice Stone's dissent in *Heiner v. Donnan*, *supra*, 285 U.S. at 332.

<sup>12</sup> *Keller v. United States*, 213 U.S. 138, 149 (1909) (dissent); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (dissent).

<sup>13</sup> Mr. Justice Rehnquist has characterized the doctrine as relying "heavily on notions of substantive due process that have been authoritatively repudiated," *Vlandis v. Kline*, *supra*, 412 U.S. at 463, and as "in the last analysis nothing less than an attack upon the very notion of law-making itself." *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 660. The Chief Justice has criticized the doctrine since *Stanley v. Illinois*, 405 U.S. 645, 662 (1972), and Mr. Justice Powell expressed concern "about the implications of the doctrine for the traditional legislative power to operate by classification." *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 652 (concurring opinion).

<sup>14</sup> See Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 Ind. L. Rev. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 Stan. L. Rev. 449 (1975). But see Simson, *The Conclusive Presumption Cases: The Search For A Newer Equal Protection Continues*, 24 Cath. L. Rev. 217 (1975). Besides pointing out that few, if any, legislative classifications would survive the consistent application of the doctrine, the commentators have complained that the Court has never explained what prompted it to invoke the doctrine in some cases but not in others.

While *Weinberger v. Salfi*, 422 U.S. 749 (1975), authored by Mr. Justice Rehnquist, might be viewed as a major step back from the doctrine,<sup>15</sup> we cannot say that the doctrine has lost the support of a majority of the Court because it has been invoked subsequent to *Salfi* to strike down a Utah statute, *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), and to distinguish in *Mathews v. Lucas*, 96 S.Ct. 2755, 2765 (1976), the earlier *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Yet in sustaining a state compulsory-retirement-for-age statute in *Massachusetts Board of Retirement v. Murgia*, 95 S.Ct. 2562 (1976), last June, the Court made no reference to the doctrine.<sup>16</sup>

In summary, we cannot say whether the irrebuttable presumption doctrine or the substitute analysis followed in *Salfi*<sup>17</sup> would be thought appropriate for this case by a majority of the Supreme Court. Inasmuch as our

<sup>15</sup> It was said that, if extended, the irrebuttable presumption doctrine of the prior cases could become

"a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." 422 U.S. at 772.

<sup>16</sup> An omission which is particularly striking in light of Mr. Justice Rehnquist's dissent in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 659 (1974), advertent specifically to the effect of the irrebuttable presumption doctrine on mandatory retirement statutes.

<sup>17</sup> "The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." 422 U.S. at 777. (Emphasis supplied.) This approach to the problem of individual fairness when the legislature operates by classification appears to be consistent with the emphasis in *Vlandis v. Kline*, 412 U.S. 441, 452-454 (1973), upon the "reasonable alternative means of making the crucial determination" available to Connecticut. Cf. *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951).

equal-protection holding decides the case, it is unnecessary to reach the more difficult due process question.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CAMPBELL, *Concurring*.

Plaintiff's complaint challenged the constitutionality of Ch. 28.1-3 and defendant's conduct pursuant thereto, contending that the ordinance "deprives persons of a right to employment and to earn a living without due process of law", in violation of the Due Process Clause of the Fourteenth Amendment, and that it "singles out a class of persons for denial of access to a governmentally-established prerequisite to employment by denying public chauffeur's licenses to persons convicted of certain crimes," in violation of the Equal Protection Clause of the Fourteenth Amendment.

The District Court granted defendant's motion to dismiss on the ground that there existed a rational relationship between the classification (persons convicted of a crime involving the use of a deadly weapon) and the goal which the ordinance seeks to achieve (the protection of the public). Accordingly, the court held that the ordinance did not violate the Equal Protection Clause. In addition, the court held that the automatic exclusion of all persons convicted of a crime involving the use of a deadly weapon did not violate the Due Process Clause, holding that the "test of the appropriateness of the classification is whether it has a reasonable relationship to the goals sought to be attained."

On appeal, plaintiff contends that the ordinance creates an irrebuttable presumption of unfitness, barring issuance of a chauffeur's license irrespective of evidence to the contrary and thus deprives him of any opportunity for a meaningful hearing. He also contends that the ordinance violates the Equal Protection Clause

of the Fourteenth Amendment in two respects: (1) that the ordinance unconstitutionally discriminates against applicants previously convicted of a crime involving use of a deadly weapon, as against all other persons; and (2) that the distinction in treatment afforded ex-offender applicants, on the one hand, and licensees convicted of such offenses subsequent to issuance of the license, on the other, is irrational. The majority would resolve this appeal solely on the basis of plaintiff's second equal protection argument, holding that:

"Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment."

While I agree fully with this conclusion, I respectfully suggest that the remaining contentions advanced by plaintiff should also be addressed and resolved by this Court. If the only constitutional deficiency of this ordinance were the fact that it irrationally distinguishes between certain ex-offender applicants and those who are convicted of certain crimes subsequent to the issuance of a license (affording the latter, but not the former, an opportunity for a meaningful hearing), that deficiency easily could be cured by amending the ordinance so as to provide for the automatic revocation of any license held by a person who, subsequent to issuance

thereof, is convicted of certain felony offenses. Upon passage of such an amendment and the continued refusal to afford this plaintiff a *meaningful* hearing (i.e., one at which the result is not preordained by an irrebuttable presumption of unfitness), I would anticipate Mr. Miller's return to the district court to challenge the constitutionality of the ordinance on the remaining grounds heretofore advanced in the district court and again on appeal. In view of the realistic possibility that this would occur, and in the interest of avoiding unnecessary litigation, I believe the due process issue, as well as the remaining equal protection issue, should be resolved at this time.

#### EQUAL PROTECTION

Plaintiff argues that the ordinance, on its face, discriminates against one group of persons—those previously convicted of a crime involving the use of a deadly weapon—as against all other persons and as against other ex-offenders.<sup>1</sup>

In order to assess this aspect of plaintiff's equal protection claim, it is of course necessary first to determine the appropriate standard by which the constitutionality of the ordinance should be measured. Plaintiff urges that his right to work is such a fundamental right that the classification provided for in the ordinance should be tested against a constitutional standard of "strict scrutiny," and upheld only if found to be necessary to promote a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The defendant, on the other hand, argues that the legislative classification under consideration does not interfere with the exercise of any fundamental rights, and should be measured against the test of rationality set forth in *Dandridge v. Williams*, 397 U.S. 471 (1970), wherein the

<sup>1</sup> In this latter respect, plaintiff notes that the ordinance allows issuance of a public chauffeur's license to certain other ex-offenders whose convictions pre-date application for such a license by more than eight years. In addition, persons convicted of certain other felonies may be issued a license irrespective of the date of conviction, if they have been honorably discharged from a branch of the Armed Services in the interim.

Court held that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all . . . It is enough that the State's action be rationally based and free from invidious discrimination." 397 U.S. at 486-487.

The strict scrutiny test, requiring that a legislative classification be upheld only if it is necessary to advance a compelling state interest, will be used to measure the constitutionality of a legislative classification "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement v. Murgia*, ... U.S. ...., 49 L. Ed. 2d 520, 524, 96 S. Ct. (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Included among such fundamental rights are those protected by the First Amendment, such as the right of individuals to associate for the advancement of political beliefs, *Williams v. Rhodes*, 393 U.S. 23 (1968), and at least to some extent the right of personal privacy, *Roe v. Wade*, 410 U.S. 113 (1973). Also viewed as "fundamental" are the right to vote, *Bullock v. Carter*, 405 U.S. 134 (1972) and the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969). I am not persuaded, however, that the right to employment in a particular field of endeavor is "fundamental" in a sense which requires application of the strict scrutiny rule. Of particular note is the Supreme Court's recent decision in *Massachusetts Board of Retirement v. Murgia*, *supra*, wherein the Court found "no support to the proposition that a right of governmental employment *per se* is fundamental." In *Murgia*, the Court refused to apply the strict scrutiny rule to a mandatory retirement statute which required that state police officers retire at age fifty, and upheld the constitutionality of the statute under the Equal Protection Clause on the ground that the classification was rationally related to a legitimate state objective:

"[T]he State's classification rationally furthers the purpose identified by the State: Through mandatory retirement at age 50, the legislature seeks to protect

the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age." .... U.S. at ..... 49 L.Ed.2d at 525-526.

Nor do I believe the strict scrutiny rule should be applied on the ground that the legislative classification operates to the peculiar disadvantage of a "suspect class". Indicative of classifications which have been strictly scrutinized on the ground that they affect a "suspect class" are those based upon race: *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); alienage: *Graham v. Richardson*, 403 U.S. 365 (1971); ancestry or nationality: *Oyama v. California*, 332 U.S. 633 (1948) and possibly, sex: *Frontiero v. Richardson*, 411 U.S. 677 (1973).<sup>2</sup>

<sup>2</sup> In *Frontiero*, the Court held unconstitutional a statutory scheme which required that, in order to claim a spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits, a female member of the armed services had to establish that she contributed to over one-half of her husband's support. The same statutory scheme allowed a serviceman to claim his wife as a "dependent" without regard to whether she, in fact, was dependent upon him for any part of her support. The Opinion of the Court was authored by Justice Brennan on behalf of himself and Justices Douglas, White and Marshall. Justice Stewart's brief concurrence agreed "that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed v. Reed*, 404 U.S. 71". Chief Justice Burger and Justice Blackmun joined in an opinion authored by Justice Powell concurring in the judgment but expressing the view that "it is unnecessary for the Court in this case to characterize sex as a suspect classification with all of the far-reaching implications of such a holding. *Reed v. Reed*, 404 U.S. 71 . . . which abundantly supports our decision today did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale." 411 U.S. at 691-692. It thus remains less than clear whether sex is a "suspect class" for the purpose of applying the strict scrutiny test. See, *Kahn v. Shevin*, 416 U.S. 351 (1974); *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 and Brennan J., dissenting at 497-505, *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7, 13 (1975), *Craig v. Boren*, 45 LW 4057 (1976).

The Supreme Court has noted that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez, supra*, at 28. *Murgia, supra*. Admittedly, significant societal disabilities often derive solely from the fact that a person is an ex-offender, particularly in the area of employment opportunities. Nevertheless, the Supreme Court decisions which have considered expanding the category of "suspect" classifications have shown a clear reluctance to do so. See, for example, the concurring opinions of Justices Stewart and Powell, expressing the views of four members of the Court, in *Frontiero*, and the Court's recent decision in *Murgia*, in which the Court declined an opportunity to include the aged as a "suspect class", notwithstanding the Court's acknowledgement that "the treatment of the aged in this Nation has not been wholly free of discrimination . . ." Accordingly, I would not deem ex-offenders to constitute a "suspect class" for purposes of the Equal Protection Clause, and would hold the strict scrutiny rule inapplicable.

It follows that the constitutionality of the ordinance under the Equal Protection Clause does not hinge on whether or not the statute is necessary to promote a compelling governmental interest. The defendant need only establish that the classification is rationally related to a legitimate legislative purpose. I believe that standard has been satisfied in this case.

Clearly, the City of Chicago has a legitimate interest in promoting public safety, and in this connection, may regulate the issuance of public chauffeur's licenses so as to better insure that the character and competence of the licensee is consistent with the high standards traditionally imposed upon common carriers with respect to the care and safety of public passengers. As the defendant correctly argues, persons who choose to be transported in taxicabs obviously are unable to make an informed choice in selecting the driver, and therefore are entitled to assume that, having been licensed by the

City, the licensee is a person of satisfactory character and competence. No doubt the City of Chicago has a legitimate interest in attempting to insure that public chauffeur licensees are persons of good character, are capable of being entrusted with the operation of a public passenger vehicle.

There is also a rational basis for considering an applicant's prior criminal record in determining whether he is a person of good character, worthy of being entrusted with the responsibilities of a public chauffeur. The past conduct of an applicant may be the best indicator of his present character and his future actions. As the *amicus curiae* brief filed in appellant's behalf by the Chicago Council of Lawyers and the John Howard Association concedes, well over 60% of those arrested for the commission of crimes nationally are ex-offenders.

Accordingly, the distinction drawn between ex-offenders and other applicants for public chauffeur's licenses is rationally related to a legitimate legislative goal, and therefore does not contravene the Equal Protection Clause.<sup>3</sup> I would also reject plaintiff's contention that the ordinance unconstitutionally distinguishes between those convicted of crimes involving the use of a weapon and ex-offenders convicted of certain other offenses. (The ordinance prohibits absolutely the issuance of a public chauffeur's license to the former, but allows under certain circumstances issuance of a license to the latter). Defendant's principal concern in considering the past criminal record of an applicant is the prospect of a driver placing a passenger in physical jeopardy. Accordingly, the ordinance gives greater weight to crimes such as armed robbery and rape than to crimes not involving violence and crimes not directed against other persons. If anything, this added specificity

<sup>3</sup> Nor do I believe, as plaintiff contends, that *Reed v. Reed*, 404 U.S. 71 (1971) created a new and more stringent equal protection standard in cases which do not require application of the strict scrutiny rule. *Reed* evidences no intention to deviate from the rationality standard, except perhaps in sex discrimination cases, which may well involve a "suspect class". See, n. 4, *supra*.

supports the constitutionality of the statute by more narrowly defining the class of persons to whom public chauffeur's licenses may not issue.

#### DUE PROCESS

In *Freitag v. Carter*, 489 F. 2d, 1377 (7th Cir., 1973), this Court held that a governmental licensing body which judges the fitness of an applicant for a public chauffeur's license must, as a matter of due process, afford the applicant adequate notice and a hearing. *Freitag* held that the applicant was entitled to a hearing and an opportunity to present evidence of his present mental condition, notwithstanding an investigation which showed that, some fourteen years earlier, the applicant had been a patient at a state mental hospital.

In the instant case, plaintiff contends that the absolute bar against issuance to him of a public chauffeur's license on the ground that he was previously convicted of a crime involving the use of a deadly weapon deprives him of rights guaranteed under the Due Process Clause of the Fourteenth Amendment. Plaintiff correctly argues that any hearing held upon his application for a public chauffeur's license would be utterly meaningless, since his status as an ex-offender stands as an absolute bar to the issuance of a license, notwithstanding the amount and/or quality of evidence attesting to his present good character. Thus, plaintiff argues that the ordinance creates an unconstitutional irrebuttable presumption that he is a person of unsatisfactory character, depriving him of any opportunity for a meaningful hearing and thereby denying him due process of law.

The defendant argues that the plaintiff was not deprived of either his "liberty" or "property", and that accordingly, he was not deprived of procedural due process of law by the City's failure to provide a hearing. Defendant's contention in this respect is based primarily on *Board of Regents v. Roth*, 408 U.S. 564 (1972), wherein the Court held that an untenured professor who had been hired for one year, following which he was informed that he would not be rehired for the next year,

was not deprived of either liberty or property under the Due Process Clause, and therefore was not entitled to a hearing.

I believe the Court in *Roth* sufficiently distinguished the facts of that case from instances involving the issuance or nonissuance of a license, the absence of which forecloses the applicant from an entire range of employment opportunities. *Board of Regents v. Roth*, *supra* at 574; *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). In addition, defendant's contention is implicitly rejected by this Court's decision in *Freitag*, *supra*.

Consideration of plaintiff's "irrebuttable presumption" argument requires a brief review of the leading, and in some instances, apparently inconsistent case law in this area. In *Bell v. Burson*, 402 U.S. 535 (1971), the Court held unconstitutional a Georgia statute which provided that an uninsured motorist's driver's license would be suspended if he became involved in an accident resulting in damage, and would remain suspended until liability had been determined. The statute did not provide for any hearing procedure under which the driver might avoid suspension of his license by presenting evidence of non-liability for the damage caused in the accident. The Court held that the failure to provide such a hearing deprived uninsured motorists due process of law. While *Bell* does not use the term "irrebuttable presumption", it clearly mandates a "meaningful hearing" at which the licensee might establish his non-liability. "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision" would not be a meaningful hearing. 402 U.S. at 542.

The following year, the Court decided *Stanley v. Illinois*, 405 U.S. 645 (1972), holding unconstitutional an Illinois statute which served absolutely to deprive an unwed father of custody of his illegitimate child. Although the law of Illinois provided that a parent could not be denied custody without notice, a hearing, and proof of parental unfitness, unwed fathers were conclusively presumed to be unfit, and therefore were not afforded a hearing. In holding the statute unconstitutional, the Court stated:

"It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children." 405 U.S. at 654-655.

The *Stanley* Court rejected Illinois' argument that it should not be required to undergo the inconvenience of a hearing because unwed fathers are so seldom fit and proper parents.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the constitution recognizes higher values than speed and efficiency . . .

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." 405 U.S. at 656-657.

A year later the Court decided *Vlandis v. Kline*, 412 U.S. 441 (1973) and *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973). In *Vlandis*, the Court held unconstitutional a Connecticut statute which, in determining the tuition to be paid by students enrolled at a state university, classified as permanent non-residents all unmarried students who had legally resided outside of Connecticut within twelve months prior to applying for admission. Relying on *Stanley*, the Court held that:

"The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised. In the situation before us, reasonable alternative means for determining bona fide residence are available." 412 U.S. at 451.

In *Murry*, the Court held unconstitutional Section 5(b) of the Food Stamp Act, 7 U.S.C. Section 2014(b) which, in effect, denied food stamp eligibility to any household containing a person eighteen years or older who had been claimed as a "dependent" for federal income tax purposes within the preceding twelve months by a person not eligible for food stamp relief. The Supreme Court agreed with the District Court's conclusion that the Act created "an irrebuttable presumption contrary to fact."

Consistent with the aforementioned decisions, the Court subsequently decided *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). In *LaFleur*, the Court held unconstitutional a maternity leave rule requiring a pregnant teacher to commence maternity leave five months prior to the expected birth of her child, and precluding re-employment prior to three months following birth. The Court held that the principles enunciated in *Stanley* and *Vlandis* were controlling, and that "the conclusive presumption embodied in these rules, like that in *Vlandis*, is neither 'necessarily [nor] universally true', and is violative of the Due Process Clause." 414 U.S. at 646.

More recently, the Court again applied the "irrebuttable presumption" rule, holding unconstitutional a Utah statute which rendered pregnant women ineligible for unemployment benefits for a period extending from twelve weeks before the expected date of childbirth until six weeks following childbirth: "The presumption of incapacity and unavailability for employment created by the challenged provision is virtually identical to the presumption found unconstitutional in" *LaFleur*. Thus, the Court concluded "that the Utah unemployment com-

pensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the *LaFleur* case." *Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975).

Balanced against the foregoing authorities are cases involving mandatory retirement statutes and the Supreme Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975). In *McIlvaine v. Pennsylvania*, 415 U.S. 986 (1975), the Court dismissed, for want of a substantial federal question, an appeal from the Pennsylvania Supreme Court which upheld a state law requiring retirement of police at age sixty. *McIlvaine* was quickly interpreted as upholding the constitutionality of mandatory retirement statutes against equal protection and due process claims. Thus the Second Circuit in *Rubino v. Ghezzi*, 512 F. 2d 431 (2nd Cir., 1975) affirmed the District Court's refusal to convene a three judge district court in an action challenging a state statute requiring retirement of judges at age seventy. The *Rubino* Court held that "the issues of equal protection and due process [irrebuttable presumption] were before the Court in *McIlvaine* and . . . the Supreme Court did not consider those issues to present a substantial federal question." 512 F. 2d at 433.

The Sixth Circuit followed *Rubino* in *Talbot v. Pyke*, 533 F. 2d 331 (1976) affirming summary judgment in defendant's favor in an action challenging an Ohio statute requiring retirement at age seventy.

In this circuit, the issue was presented in *Gault v. Garrison*, 523 F. 2d 205 (1975) in which a tenured school teacher was forced to retire at age sixty-five pursuant to school board policy. Plaintiff challenged the policy on equal protection grounds and as an irrebuttable presumption in violation of the Due Process Clause. In *Gault*, this Court took note of the Supreme Court's dismissal "for want of substantial federal question" of the appeal in *McIlvaine*. It was further noted that a three judge district court in *Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), had held that the dismissal for want of a substantial federal question in *McIlvaine* required

dismissal of a constitutional challenge made by plaintiff Weisbrod, a HUD attorney, to a Federal law mandating retirement at age seventy. The Supreme Court summarily affirmed. *Weisbrod v. Lynn*, 420 U.S. 940 (1975).

The *Gault* Court recognized that if *Weisbrod* and *McIlvaine* were to be considered binding precedents, they would not be distinguishable from the *Gault* case. However, the Court declined to resolve the merits of the case, and stayed further proceedings pending the Supreme Court's decision in *Massachusetts Board of Retirement v. Murgia*, with respect to which the Supreme Court had recently noted probable jurisdiction. 421 U.S. 974 (1975). The hope, obviously, was that the Supreme Court in *Murgia* would resolve the due process question presented by plaintiff *Gault*—i.e., whether a mandatory retirement statute creates an unconstitutional irrebuttable presumption that, because of age, the employee is unable to continue to adequately perform the services for which he has been hired.

As did the panel in *Gault*, we also awaited the Supreme Court's decision in *Murgia*, hoping that further light might be shed on the constitutionality of statutes creating irrebuttable presumptions, particularly in view of the Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), discussed *infra*, upholding the constitutionality of a statute which quite obviously creates an irrebuttable presumption and forever excludes certain persons from receiving certain benefits under the Social Security Act.

On June 25, 1976, the Supreme Court decided *Murgia*, without discussing the constitutionality of mandatory statutes under the Due Process Clause, and without characterizing the statute, requiring retirement of Massachusetts State Police at age fifty, as creating an irrebuttable presumption that officers over the age of fifty are physically unable adequately to perform the duties of a Massachusetts state police officer. The *Murgia* Court upheld the constitutionality of the statute in question solely on equal protection grounds holding that the strict scrutiny rule was not applicable, that the

statute was designed to achieve a legitimate legislative purpose and that the classification was rationally related to the achievement of that purpose.

In the interim, the Court decided *Weinberger v. Salfi*, 422 U.S. 749 (1975), upholding the constitutionality of a provision of the Social Security Act which defined "widow" and "child", for the purpose of survivor's benefits to exclude the widow or step-child of any deceased wage earner who had been the husband or step-father of the claimant for a period of less than nine months at the time of death. The stated purpose of the rule was to discourage sham marriages designed to enable one spouse to claim benefits upon the anticipated early death of the wage earner. The *Salfi* Court held that:

"The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justify the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard." 422 U.S. at 777.

In reaching this conclusion, the Court placed a heavy emphasis on the fact that "social welfare legislation" was involved, requiring broader discretion in the use of legislative classifications in order to maximize the use of available funds and resources. Thus, the Court quoted extensively from its prior decisions in *Flemming v. Nester*, 363 U.S. 603, 611 (1960).<sup>4</sup> *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).<sup>5</sup> *Richardson v.*

<sup>4</sup> "Particularly when we deal with a withholding of a non-contractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." 363 U.S. at 611.

<sup>5</sup> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." 397 U.S. at 485.

*Belcher*, 404 U.S. 78, 81 (1971)<sup>6</sup> and *Geduldig v. Aiello*, 417 U.S. 484 (1974). Consistent with its emphasis that the claim in *Salfi* was distinguishable because social welfare legislation was involved, the Court declined to follow *Stanley* and *LaFleur* on the ground that, unlike the claims asserted in those cases, *Salfi* involved:

"a non-contractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status, *Dandridge v. Williams*, *supra*, though of course Congress may not invidiously discriminate among such claimants on the basis of a 'bare congressional desire to harm a politically unpopular group,' *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, . . . (1973), or on the basis of criteria which bear no rational relation to a legitimate legislative goal. *Jimenez v. Weinberger*, 417 U.S. 628, . . . (1974); *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508, . . . (1973)." 422 U.S. at 772.

The Court distinguished *Vlandis* on the ground that "the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772.

I find some difficulty in so easily distinguishing *Jimenez v. Weinberger*, 417 U.S. 628 (1974), wherein the Court declared unconstitutional a provision of the Social Security Act which, in effect, precluded an illegitimate child born after the onset of the parent's disability, from obtaining disability benefits, unless the child were eligible under other provisions of the Act regarding legitimization, inheritance or defective marriage ceremonies. The *Jimenez* Court concluded that the purpose of the statutory scheme was to prevent spurious claims and insure that only those actually entitled to disability benefits received such payments. The Court, distinguishing *Dandridge* on the ground that the purpose of

<sup>6</sup> "A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination' . . ." 404 U.S. at 81.

the legislative provision in *Jimenez* did not concern the allocation of finite resources, gave considerable weight to the fact that the classification created an irrebuttable presumption, noting that the dilemma of noneligible illegitimate children "is compounded by the fact that the statute denies them any opportunity to prove dependency in order to establish their 'claim' to support and, hence, their right to eligibility." 417 U.S. at 635. In this respect, the Court noted that:

"It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimants, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits . . ." 417 U.S. at 636.

The Court concluded that "to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment." 417 U.S. at 637.<sup>7</sup>

Similarly, notwithstanding the Court's effort to distinguish them, the *Salfi* decision is difficult to square with *Stanley*, *Vlandis* and *LaFleur*. The challenged provision in *Salfi* clearly creates an irrebuttable presumption, and in view of the Court's decisions in *Murry* and *Jimenez*, the fact that the Social Security Act is involved would not seem to be a wholly dispositive factor. Particularly with respect to *Vlandis*, the basis for distinction is difficult to comprehend. The Court seems to be saying that both the residency rule in *Vlandis* and the challenged provision in *Salfi* "speak in terms of the bona fides of the parties", but unlike the residency rule in *Vlandis*, the challenged provision in *Salfi* does

<sup>7</sup> For the same reasons, the *Salfi* decision is difficult to distinguish, on the basis of applicable legal principles, from the Court's decision in *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973).

not "make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772. But clearly, the statutory provision under consideration in *Salfi* did nothing less than preclude a widow, who married the deceased wage earner less than nine months prior to his death, from presenting evidence that the marriage was not a sham designed to enable one spouse to claim benefits upon the death of the other.

The extent to which the foregoing cases conflict with one another, and the extent to which the irrebuttable presumption rule has been criticized, leads the majority to conclude that

"we cannot say whether the irrebuttable presumption doctrine or the substitute analysis followed in *Salfi* would be thought appropriate for this case by a majority of the Supreme Court. Inasmuch as our equal-protection holding decides this case, it is unnecessary to reach the more difficult due process question."

As previously indicated, I believe it is necessary to resolve the due process issue, and would do so in plaintiffs' favor.

A careful reading of the *Salfi* decision suggests that present in that case were a combination of factors which might render application of the irrebuttable presumption rule inappropriate. First is the already discussed fact that the challenged provision was but a part of a comprehensive social welfare legislative scheme. Secondly, the Court noted that the "prophylactic approach" obviates the need to expend limited social welfare resources for the purpose of considering "large numbers of individualized determinations". The Court also recognized that the duration-of-relationship rule protects claimants, whose relationship with the deceased exceeded nine months, from the "uncertainties and delays of administrative inquiry into the circumstances of their marriages." Further, the Court noted that the very existence of the rule could discourage sham marriages. Finally, and perhaps most importantly, the Court recognized that it is not "at all clear that individual determinations could effectively filter out sham arrange-

ments, since neither marital intent, life expectancy, nor knowledge of terminal illness has been shown by appellees to be reliably determinable." 422 U.S. at 782-783.

This Court has already recognized the special status afforded social welfare legislation in the context of a classification which might otherwise be viewed as creating an unconstitutional irrebuttable presumption. *Fisher v. Secretary of U.S. Dept. of Health, Ed. and Welfare*, 522 F. 2d 493 (7th Cir., 1975).

In addition, some consideration must be given to the extent to which individualized determinations of eligibility would so burden the system as to substantially interfere with achievement of the legislative goal. In *Vlandis*, for example, the Court specifically noted that, as alternatives to the conclusive presumption in that case "there are other reasonable and practical means of establishing the pertinent facts on which the State's objective is premised." 412 U.S. at 451. Similarly, the *LaFleur* Court observed that "school boards have available to them reasonable alternative methods of keeping physically unfit teachers out of the classroom." 414 U.S. at 647, n. 14.

Thus, while "an interest in devising prompt and efficient procedures to achieve legitimate objectives . . ." will not suffice to justify classifications which constitute irrebuttable presumptions, *LaFleur, supra*, at 646,<sup>8</sup> it nevertheless would appear that a classification will not be held unconstitutional where individualized determinations of eligibility will necessarily and significantly interfere with the satisfactory operation of an overall legislative scheme. Such instances might well be limited to large and comprehensive social welfare programs,

<sup>8</sup> As the *Stanley* Court emphasized, the "Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." 405 U.S. at 656.

such as those encompassed under the Social Security Act, involving distribution of benefits to millions of claimants and requiring the promulgation of prophylactic rules concerning eligibility.

Finally, the *Salfi* Court emphasized that individual determinations might not effectively filter out sham marital arrangements. I think it is safe to say that in most other instances, adequate hearing procedures will advance, rather than retard, the fact-finding process.

Turning to the ordinance challenged by plaintiff Miller, none of the foregoing considerations are applicable. I therefore believe we should be guided by the Court's decisions in *Stanley*, *Vlandis* and *LaFleur*. Of particular significance is the fact that, subsequent to the decision in *Salfi*, the Court applied the irrebuttable presumption rule in holding a statutory provision unconstitutional. *Turner v. Dept of Employment Security*, 423 U.S. 44 (1975).

As in *Vlandis*, the hearing procedure which this Court required in *Freitag* offers a "reasonable and practical means of establishing the pertinent facts on which the [City's] objective is premised." 412 U.S. at 451. Moreover, the use of irrebuttable presumptions of ineligibility is particularly repugnant where they preclude an applicant from ever obtaining the credentials necessary to engage in a particular field of endeavor. The right to engage in a particular type of employment may not be a "fundamental right" for the purposes of the strict scrutiny test, but it is nevertheless a very important right, and one which should not be summarily denied through the use of irrebuttable presumptions of ineligibility. See, *Berger v. Board of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975).

Contrary to the defendant's contention, due process arguments based upon the presence of an irrebuttable presumption are not simply indirect efforts to attack a statute on equal protection grounds. Under the Equal Protection Clause, an unconstitutional classification may not be considered in determining eligibility. As indicated *supra*, the past criminal record of an applicant for a public chauffeur's license is a valid consideration

in determining the applicant's character and fitness. Due process considerations require only that the applicant be given a meaningful opportunity to present evidence of good character and fitness in contravention of any contrary inference based upon his prior conduct.

As does the majority, I fully recognize that, to say the least, this area of the law continues to evolve. On the one hand, decisions such as *Bell*, *Stanley*, *Vlandis*, *LaFleur* and *Turner* reflect a disdain for irrebuttable presumptions of ineligibility. On the other, the dissenting opinions in each of those cases and the Court's decision in *Salfi* suggest the unworkability of a rule forbidding all conclusive classifications. And as evidenced by the *Murgia* decision, the area involving perhaps the clearest use of conclusive presumptions—mandatory retirement—continues to be tested solely on traditional equal protection grounds. On the basis of what I understand to be the present state of the law, the ordinance in the instant case creates an irrebuttable presumption which deprives plaintiff of a meaningful hearing in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, I would reverse the judgment of the District Court both on the ground relied upon by the majority, and on the ground that the ordinance deprives the plaintiff of due process of law.

A true Copy:

Teste:

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Clerk of the United States Court of  
Appeals for the Seventh Circuit

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

January 25, 1977

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon.

Hon.

No. 75-1162

LUTHER MILLER,

*Plaintiff-Appellant,*

*v.*

JAMES Y. CARTER,

*Defendant-Appellee.*

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Appeal from the United States District Court for the  
Northern District of Illinois Eastern Division.  
No. 74 C 2886

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This matter comes before the Court on the "MOTION FOR STAY OF MANDATE," filed herein on January 24, 1977 by counsel for the defendant-appellee. On consideration whereof,

IT IS ORDERED that the mandate of this Court be STAYED to and including February 24, 1977 in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

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Respectfully submitted,

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MAR 26 1977

MICHAEL RODAK, JR., CLERK

No. 76-1171

In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

JAMES Y. CARTER, Public Vehicle License Commissioner  
of the City of Chicago,

*Petitioner,*

*vs.*

LUTHER MILLER, on his own behalf and on behalf of  
all others similarly situated,

*Respondent.*

**BRIEF OF RESPONDENTS IN OPPOSITION TO THE  
PETITION FOR A WRIT OF CERTIORARI**

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SUPREME COURT OF THE UNITED STATES  
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JAMES Y. CARTER, Public Vehicle License Commissioner  
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*Respondent.*

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**BRIEF OF RESPONDENTS IN OPPOSITION TO THE  
PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether the Equal Protection Clause is violated by a licensing scheme which allows licensees recently convicted of certain crimes to retain their licenses, yet forever bars even from consideration for licensure applicants convicted of exactly the same crimes years before.

**STATEMENT OF THE CASE**

By virtue of Chapter 28.1-3 of the Chicago Municipal Ordinances, chauffeur's licenses are forever unavailable to certain classes of ex-offenders, including persons convicted

"of a crime involving the use of a deadly weapon . . .". In September, 1974, plaintiff Luther Miller sought licensure. On the basis of the ordinance, his application was routinely denied. Miller had been convicted in 1965, at age 20, of armed robbery. In February, 1972, he was released on parole, and 18 months later he was discharged therefrom, having satisfactorily fulfilled the terms of his parole agreement.

Notwithstanding the bar on licenses being granted to former offenders, Chapter 28.1-10 of the Chicago Municipal Ordinances provides that already licensed public chauffeurs who are—after licensing—convicted of the same crimes as are set out in Chapter 28.1-3 do not confront the same ban as did plaintiff Miller. Rather, licensed drivers may retain their licenses, subject to revocation upon recommendation of the defendant and subsequent exercise of discretion by the mayor. This revocation procedure includes a hearing. (Pet. Br., at 8).

In sum, a licensed driver convicted of armed robbery today may retain his license; an unlicensed applicant for licensure who at any time in the past was convicted of armed robbery can never obtain a license, no matter what his age at the time of the offense and no matter how many years have elapsed since he satisfactorily completed the sentence imposed.

As a result of his denial of licensure, plaintiff Miller filed suit in Federal District Court. He alleged, among other contentions, that the licensing scheme violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the suit.

The Court of Appeals for the Seventh Circuit reversed and remanded in a per curiam decision. The appellate

court relied at the outset on its decision of four years earlier, *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), in which it had held that "the due process clause of the Fourteenth Amendment required that a 'governmental licensing body which judges the fitness of an applicant must afford that applicant adequate notice and a hearing.'" (Pet. Br., App. B, at 5a).<sup>1</sup> Plaintiff Miller was just such an applicant. The bar of Chapter 28.1-3, however, had resulted in his being afforded neither notice nor a hearing, and indeed so long as the absolute ban on former offenders existed "such a hearing on . . . (his) application . . . would be a mere formality . . .," as the Court viewed the matter. (Pet. Br., App. B., at 5a).

The appellate court went on to reason that the licensing scheme irrationally discriminated by treating persons convicted of the same crime in two manners—licensees are allowed to retain licensure, applicants are forever barred from obtaining it. In so doing, the Court examined the ordinance scheme, accepted the legitimacy of the ends sought, but found the means irrational. It stated:

The city's purported justification for this different treatment of persons who commit one of the listed offenses after receiving a license is that they have a "track record" that the commissioner and mayor can balance against the felony in evaluating fitness. The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how

<sup>1</sup> In so holding, the *Freitag* Court relied on well-established doctrine set down by this Court: *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926).

short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. Indeed, one who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would, according to the ordinance, also be eligible to retain the license, for under Ch. 28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation.

Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment.

Pet. Br., App. B, at 6a.

The defendant now petitions this Court for the grant of a writ of certiorari to review the Court of Appeals' decision.

### REASONS FOR DENYING THE WRIT

The issues presented in the petition are insufficient to warrant plenary review when judged by the standards established in Supreme Court Rule 19. There is no conflict with a decision of another Court of Appeals or of this Court; there is no unsettled question of federal law which should be decided by this Court; there is no important state question decided in conflict with applicable state law.

The Court of Appeals' decision is a narrow and relatively unimportant one, confined to a licensing matrix whose intersecting parts together create a *sui generis* scheme. The minor judicially-mandated modification imposed here carries with it virtually no impact for any other licensing system. Moreover, the decision is entirely consistent with well-established decisional law.

The Court of Appeals simply held that if the city establishes a characteristic as critical to licensure—that is, being an ex-offender—it may not treat similarly situated persons bearing that same characteristic differently. Under the licensing scheme before the Court, persons who committed certain offenses years before are barred from licensure. Nonetheless, other persons committing the same otherwise disabling offense may, at the defendant's and the mayor's discretion, retain their license, even though the criminal act occurred recently. In light of the professed purpose of the ordinance—the protection of public safety—this scheme was found to be, as it is, wholly irrational.\*

\* This Court has decided on several occasions that even though a particular class of persons is not protected from certain governmental actions, schemes which irrationally discriminate among those class members are unconstitutional. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Bastrom v. Herold*, 383 U.S. 107 (1965).

Failing to identify any aspect of Rule 19 which warrants the grant of his petition, petitioner seeks to argue a case that is indeed not even before this Court. Petitioner contends that the Court of Appeals held that the respondent has a right to "a hearing as a matter of equal protection." (Pet. Br., at 7). From this erroneous assertion petitioner proceeds to an argument of terribles: the decision (as petitioner misconstrues it) "suggests a wholly new theory of entitlement of hearings in governmental licensing proceedings." (Pet. Br., at 9). Expanding upon its chimerical parade of horrors, petitioner then offers the further notion that the Appellate Court's decision "will open the door to claims for hearings by unsuccessful aspirants to public employment" (Pet. Br., at 9).

How petitioner arrives at such conclusions is unknown to respondent, as it surely must be as well to the Court of Appeals.

Apart from the inherent irrationality of the licensing system, the scheme further fails given the mandate of *Freitag v. Carter, supra*. In *Freitag*—in which, in fact, the petitioner was also the defendant—the Court of Appeals held that the petitioner could not deny licensure to any applicant without first providing notice and a hearing. *Freitag* of course in no way required grant of the license, but only that certain procedural elements accompany consideration of the license application.

From *Freitag* flows the conclusion that a scheme providing for a "revocation procedure (which) includes a hearing" (Pet. Br., at 8) for some armed robbers—that is, already licensed felons, yet denies even the possibility of the exercise of discretion for others who are, to quote the Court, "similarly situated," is violative of the Equal Protection Clause. (Pet. Br., App. B., at 6a). The decision

below thus indeed did not establish a right to a hearing under the Equal Protection Clause, petitioner's strange view of the ruling notwithstanding. Rather, all it recognized was the demand for equality of treatment within an already existing procedural framework.

Apparently, four years later, petitioner has decided that it does not like the *Freitag* ruling. Why it did not seek relief in this Court when *Freitag* was decided is unknown. That it should now seek to do so is anomalous, to say the least.

### CONCLUSION

The issue at stake in this case is insufficient to fall within the parameters of Rule 19 of this Court. Moreover, the Court below correctly decided the issue involved herein. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APR 2 1977

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-1171**

**JAMES Y. CARTER**, Public Vehicle License  
Commissioner of the City of Chicago,

*Petitioner,*

vs.

**LUTHER MILLER**, on his own behalf and on  
behalf of all others similarly situated,

*Respondent.*

**REPLY OF PETITIONER TO BRIEF  
IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**ROBERT RETKE**,

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*Of Counsel.*

IN THE  
**Supreme Court of the United States**

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**REPLY OF PETITIONER TO BRIEF  
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---

The suggestion of Respondent that the case was not decided by the Court of Appeals on equal protection grounds is incorrect. The Court specifically declared that its decision rested upon equal protection grounds and not upon due

process considerations: "Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment." (Pet. App. B., p. 6a) In its concluding paragraph the Court re-iterated its reliance upon an equal protection rationale: "Inasmuch as our equal protection holding decides the case, it is unnecessary to reach the more difficult due process question." (Pet. App. B., p. 11a)

Moreover, the Court's statements make it entirely clear that this case was not determined by an application of the reasoning previously applied in *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973). In discussing the instant case the Court made reference to the hearing which it acknowledged was available to Respondent under the *Freitag* decision and concluded that such a hearing would be of no aid to Respondent as a result of the substantive rule provided by Ch. 28.1-3. "Such a hearing on plaintiff, Luther Miller's application, however, would be a mere formality because of the prohibition in Ch. 28.1-3 against granting a license to one who has committed a crime involving the use of a deadly weapon." (Pet. App. B., p. 5a) For these reasons Respondent's suggestion that Petitioner is belatedly seeking review of the *Freitag* decision is wholly erroneous.

Finally, Respondent wrongly assumes, as did the Court of Appeals, that the relevant class involved is simply the class of "ex-offenders" and concludes that a denial of equal protection is established because some ex-offenders are accorded a hearing and others are not. The pattern of Petitioner's licensing procedure cannot reasonably be viewed in that simplistic perspective. It is essential to recognize that the relevant ordinances deal with two classes of persons:

those who are currently licensed and employed as cab drivers and those who are only applying for a license with the intention of seeking employment. With regard to those currently licensed the City Council has concluded that they have an interest warranting a due process hearing before revocation of their licenses and termination of their employment may be affected. However, new applicants for a license, because they do not have a career and current employment at stake, are not deemed to have the type of interest which requires such procedural treatment. It is submitted that viewed in this light the licensing procedure is rational and proper and does not result in a denial of equal protection.

### CONCLUSION

For the foregoing reasons and for the reasons presented in Petitioner's original Petition a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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April 1, 1977

IN THE

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OCTOBER TERM, 1976

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JAMES Y. CARTER, Public Vehicle License  
Commissioner of the City of Chicago,  
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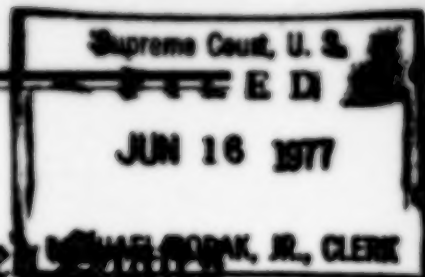
On Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit

**BRIEF OF PETITIONER**

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PETITION FOR CERTIORARI FILED FEBRUARY 24, 1977  
CERTIORARI GRANTED APRIL 18, 1977



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vs.

**LUTHER MILLER**, on his own behalf and on  
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*Respondent.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit

## BRIEF OF PETITIONER

### OPINIONS BELOW

The memorandum opinion and order of the district court in favor of defendant-petitioner, entered January 17, 1975, are unreported. They are reproduced at pages 15-16 of the Appendix.

The per curiam opinion of the Court of Appeals, filed January 4, 1977, reversing the judgment of the district court, is reported at 547 F.2d 1314 (1977). It is reproduced at pages 18-26 of the Appendix. The concurring opinion of Judge Campbell is reproduced at pages 26-45 of the Appendix.

## JURISDICTION

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The judgment of the Court of Appeals was entered on January 4, 1977.

A motion for stay of mandate pending application to this Court for a writ of certiorari was filed on January 24, 1977. On January 25, 1977, an order was entered by the Court of Appeals staying the mandate until February 24, 1977 (Appendix, p. 46).

The jurisdiction of this Court rests on U.S. Code Title 28, § 1254(1).

Defendant Carter's Petition for Writ of Certiorari was filed in this Court on February 24, 1977 and an Order granting that Petition was entered on April 18, 1977.

## QUESTION PRESENTED

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Is an ordinance which conclusively denies issuance of a public chauffeur's license to any applicant convicted of certain armed felonies violative of the Equal Protection Clause because revocation of a present licensee's previously granted license is discretionary after a hearing rather than mandatory?

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

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### Constitution of the United States

#### Amendment XIV:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### United States Code

#### Title 42, § 1983:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

### Municipal Code of the City of Chicago

#### Chapter 28.1-2:

It is unlawful for any person to drive a public passenger vehicle on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city without first having obtained a license as a public chauffeur.

Chapter 28.1-3:

Applications for public chauffeur licenses shall be made in writing to the commissioner upon forms provided by him therefor. . . .

....  
No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon . . .

Chapter 28.1-10:

....  
If any person has obtained a public chauffeur's license by application in which any material fact was omitted or stated falsely, or if any chauffeur shall become unfit to operate a public passenger vehicle on account of any infirmity of body or mind or because of addiction to the use of drugs or intoxicating liquors, or shall violate any criminal law which, if convicted for such offense, would disqualify any applicant for a chauffeur's license . . . the commissioner may recommend to the mayor that his license shall be revoked and the mayor, in his discretion, may revoke such license.

STATEMENT OF THE CASE

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The Complaint

In his amended complaint (App. p. 3) the respondent sought injunctive and declaratory relief from Chapter 28.1-3 of the Municipal Code of the City of Chicago which provides that no public chauffeur's license (taxi driver's license) "shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon . . . ." Respondent alleged that he had been convicted of armed robbery, had served a sentence in the Illinois penitentiary and completed parole. He alleged that pursuant to the ordinance and based upon his criminal conviction he had been denied a public chauffeur's license. This denial, he alleged, was in violation of his rights under the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States.

The Decision of the District Court

In its memorandum opinion and order (App. p. 15) the District Court dismissed respondent's complaint. The court found that the ordinance did not violate the Eighth Amendment because punishment of offenders was not its purpose. The court found no denial of equal protection because the classification of persons convicted of a crime involving use of a deadly weapon is rationally related to the protection of the users of public vehicles. Finally the court declared that an irrebuttable presumption barring a specified class of persons from a certain occupation is not a denial of due process where, as in this instance, there is a rational relationship between the classification and goals sought to be achieved.

### The Opinion of the Court of Appeals

The judgment of the Court of Appeals for the Seventh Circuit (App. p. 18) reversed and remanded the decision of the district court. The Court of Appeals concluded that the ordinance which conclusively denies a public chauffeur's license to any applicant convicted of an armed felony resulted in a denial of equal protection because another ordinance provides that a present licensee's license is not automatically revoked as a consequence of such an offense, but instead may be revoked in the discretion of the Mayor. The court did not hold that applicants for the license are entitled under the Due Process Clause to a hearing; nor did it consider the differing interests of present licensees and new applicants as basis for differing procedural treatment. Rather, the court assumed that the class in issue was that of ex-offenders and held that the mandatory denial of a license to newly applying offenders constituted a denial of equal protection as a consequence of the fact that revocation of licenses of offenders already licensed is discretionary after a hearing.

The Court of Appeals declined to rule on Respondent's due process arguments. A concurring opinion of District Judge Campbell (App. p. 26), however, considered Respondent's contention that the ordinance constituted an impermissible irrebuttable presumption and concluded that the ordinance should be held violative of the Due Process Clause.

### SUMMARY OF ARGUMENT

---

The Municipal Code of the City of Chicago provides that any applicant who has been convicted of a crime involving the use of a dangerous weapon will be denied a taxi driver's license. However, an incumbent licensee who commits such an offense may not have his license revoked except after a hearing at which he may submit argument or evidence to demonstrate continuing fitness for the license.

This disparity reflects an acknowledgement of two factors which differentiate the circumstances of applicants and licensees. First, a current licensee has a career at stake which is terminated by the revocation of his license. For this reason the City has recognized that his interest resembles that of a governmental employee who has a property interest in his job which may not be extinguished except after a hearing. An applicant, on the other hand, has nothing analogous to a property interest in the employment for which he is seeking to qualify.

Second, an already licensed driver has created a record during his employment which is the most reliable indicator of his current and future fitness. An applicant, however, has not demonstrated in practice whether he is an appropriate candidate for the license and in his case the commissioner, if he were to provide a hearing, would likely be compelled to rely upon probation reports, dissimilar employment experiences or psychological evaluations. For these reasons the commissioner can more confidently rely upon a hearing to yield reliable evidence on the issue of fitness of licensees than could be done in the case of applicants.

Because a taxi driver has a high degree of control over his passenger who is unavoidably uninformed in his selection of drivers, the licensing authority has a substantial responsibility in protecting the public from criminal actions by taxi operators. This responsibility is met, among other ways, by the disqualification of those who have been convicted of crimes involving the use of a deadly weapon. Of course the public might be best protected by a categorical exclusion of all such persons from the operation of taxis. However, the City Council of Chicago has recognized the presence of countervailing considerations in the case of career drivers which make a total exclusion inappropriate and unnecessary. Those considerations are reflected in the hearing provisions of the licensing ordinance.

The interests of applicants in the license they seek cannot be identified as within any class which this Court has termed fundamental for equal protection consideration. Nor has criminal conviction, long recognized as an appropriate criterion in employment selection, ever been held a suspect classification. For these reasons the ordinance upon which this case focuses should be measured by the traditional rational basis equal protection standard. It is submitted that the ordinance meets that standard.

---

The per curiam decision of the Court of Appeals, though stated in equal protection terms, is heavily reliant upon due process considerations. The concurring opinion of Judge Campbell concludes that convicted license applicants are denied due process as a result of the use of an irrebuttable presumption of unfitness. The per curiam opinion's emphases upon the "automatic" denial of licenses to applicants without "individualized

hearings" indicates that the full court also was strongly influenced by a due process irrebuttable presumption analysis.

However, the safety of taxi passengers is a concern of such gravity and the difficulty of making individualized findings of fitness in the case of convicted applicants is so great that the irrebuttable presumption test should not be applied. Rather, the ordinance should be upheld as a rational legislative classification appropriate for the achievement of ends which could not well be served through individualized hearings.

However, even if a more rigorous, irrebuttable presumption analysis is undertaken the limited interest of convicted applicants is given adequate due process protection under the ordinance. Statutory measures which have failed an irrebuttable presumption test have done so either because the statutorily specified fact has itself been established in a manner which lacked adequate procedural safeguards or because the statutorily specified fact did not rationally or universally imply the presumed ultimate fact. The ordinance is not subject to either of these objections. The guilt of the convicted felon is established beyond any conceivable due process objection by a criminal trial. And the rationality of an inference of unfitness for cab driving based upon the commission of an armed felony cannot be questioned. Finally, any objection to the inference of present unfitness based upon a possibly long-past conviction is subject to this Court's repeated holding that such limitations are inherently legislative decisions. Thus the ordinance, even if measured against an irrebuttable presumption standard, does not deny due process to convicted applicants.

## ARGUMENT

### Prefatory Note

The ordinance subjects both applicants and incumbent licensees to a denial of their cab drivers' licenses for conviction of an armed felony. The distinction made between the two classes is that an applicant is automatically disqualified by a conviction but an incumbent licensee may have a hearing after which his license may be revoked in the discretion of the Mayor. Thus the difference in treatment accorded the two classes is entirely procedural. The opinion of the Court of Appeals purports to dispose of the case exclusively on an equal protection analysis and avoids directly confronting the due process issues. However because the Court's opinion appears to borrow from the due process analyses spelled out in the concurring opinion and for the convenience of this Court, if it should conclude that the case cannot be decided exclusively upon equal protection grounds, Petitioner in part II of this Brief has also addressed the due process issues. Petitioner submits that the ordinance is constitutional whether measured by equal protection standards or due process criteria.

#### I.

### DENIAL OF A HEARING TO APPLICANTS DOES NOT RESULT IN A DENIAL OF EQUAL PROTECTION.

In stating its decision in this case the Court of Appeals declared:

An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. [App. p. 21]

The premise that applicants and licensees are similarly situated is basic to the Court's conclusion that applicants are denied equal protection by Chicago's ordinance. It is Petitioner's contention that that premise is fundamentally erroneous.

This Court has held in a variety of contexts that governments create property rights and entitlements, not otherwise extant, through rules and understandings and that those rights, having been so created, must be accorded due process protections. In *Perry v. Sindermann*, 408 U.S. 593 (1972), it was held that if a state college professor could demonstrate that his governmental employer had, through rules and understandings, justified his claim of entitlement to continued employment then he was entitled to a hearing before his employment could be discontinued. On the other hand in *Roth v. Board of Regents*, 408 U.S. 564 (1972), it was held that a college professor who could point to neither contractual nor statutory assurances of continued employment had no property interest in his position and could be summarily denied retention without a hearing.

This rationale has found consistent application in governmental employment cases and was recently reiterated in *Bishop v. Wood*, 426 U.S. 341 (1976). Bishop, a municipal police officer who had attained permanent employee status, was discharged for cause and without a hearing. In ruling upon his claim that he had a property interest this Court relied upon the ordinance which had been authoritatively construed to permit discharges without a hearing. Accordingly, the court held that Bishop had no right to a hearing.

This rationale has also been applied in the area of the licensing of drivers. In *Bell v. Burson*, 402 U.S. 535 (1971), this Court held unconstitutional a Georgia statute which required the summary suspension of a driver's

license after the licensee was involved in a traffic accident unless he posted bond to cover damages. The Court said:

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. [402 U.S. 539]

The City of Chicago has recognized that a cab driver has a continuing interest in his career and that this interest should be secure from termination except upon a demonstration that the licensee is unfit. This recognition is given expression in the municipal ordinance regulating cab drivers which provides that a licensee shall not suffer revocation of his license except after a hearing. *Supra* p. 4. In the instance of a driver charged with an offense such as the commission of a crime with a dangerous weapon the ordinance grants the incumbent licensee an opportunity to defend against the allegations. Also, and especially in a case where he has already been criminally convicted so that a challenge of guilt is foreclosed, he is granted an opportunity to persuade the licensing authority that his record nevertheless supports a finding of continuing fitness. In the language of *Roth, supra*, the ordinance creates in licensees an interest in their licenses which is secure from loss except through procedures established and defined by the ordinance.

Applicants, on the other hand, are granted no such assurance. Because they do not have a career at stake and have not been reliant upon taxi driving for their livelihood, the City Council has not found it appropriate to recognize in them any form of property interest. Accordingly, the municipal ordinance states that applicants who have been convicted of a crime involving

the use of a dangerous weapon are ineligible for a license and makes no provision for a contrary determination.

The Court of Appeal's equal protection decision rejects the distinctions based upon property rights recognized by *Roth, Perry*, and *Bell*. The conclusion of the Court of Appeals is that applicants must be given hearings simply because licensees are given hearings even though applicants lack the property interest upon which licensees' hearing rights are founded. The consequence of that rationale would be the virtual denial in both licensing and public employment contexts of the power to make procedural distinctions based upon the differing interests of the individuals involved.

There is a second factor which underlies the differing treatment accorded applicants and licensees. Licensees in the course of their employment establish a record by which their fitness can be judged. Thus a licensee who has demonstrated through his performance that he has not violated his responsibilities as a cab operator, even though subsequently convicted of an armed felony, might nevertheless be found fit to continue in his employment. Applicants, however, will not have created such a record. Consequently, if a hearing were conducted to determine the fitness of a convicted applicant the licensing authority would be compelled to rely upon dissimilar employment records, probation reports or psychological evaluations. Such evidence is inevitably less demonstrative of fitness for employment as a driver than evidence of actual conduct as a driver.

Nor is this policy premised merely upon administrative convenience. Rather, it is founded upon the greater reliability and probativeness of the evidence supplied by a performance record. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), reflects a similar

rationale. There, a uniformed state police officer was mandatorily retired at age 50. The Massachusetts statute embodied a presumption that officers attaining age 50 are no longer fit for such employment and provided no opportunity for such an officer to demonstrate continuing fitness. On the other hand, officers between the ages of 40 and 50 were given tests in order to make individualized determinations of fitness. This Court, in ruling against Murgia's assertion that the statute denied him equal protection, held that the mandatory retirement rule was rationally related to the statutory goal of insuring fitness in patrol officers. Although individualized testing of officers over 50 was not entirely unfeasible this Court held that the increased risk of physical disability in those over 50 and the difficulty in successfully determining fitness justified the mandatory retirement rule. The Court specifically noted testimony indicating "that evaluating the risk of cardiovascular failure in a given individual would require a number of detailed studies". (427 U.S. 307 at 311.)

Denial of an individualized determination because of difficulty in obtaining reliable evidence was similarly upheld against an equal protection attack in *Marshall v. United States*, 414 U.S. 417 (1974). In that case a narcotic addict with three felony convictions was denied rehabilitative commitment without an opportunity to demonstrate his suitability for such treatment. The controlling statute conclusively denied eligibility for any person with two or more prior felony convictions. This Court concluded in light of the medical and psychological uncertainties involved in predicting appropriate candidates for rehabilitation that Congress reasonably could conclusively exclude such individuals and that in so doing it denied neither due process nor equal protection.

This Court recently acknowledged the preferability of reliance upon objective facts such as convictions rather than individualized fact-finding in the area of determining fitness for a driver's license where individualized determinations would necessitate inquiry into such subjective factors as a driver's "disrespect" for traffic laws or "lack of ability to exercise ordinary care." *Dixon v. Love*, 45 U.S.L.W. 4447 (May 16, 1977) at 4450.

The Court of Appeals discounted the superior evidentiary qualities of a work record as a basis of distinction between licensees and applicants:

The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. [App. p. 20]

This conclusion suggests that had the ordinance denied a hearing to applicants and licensees with less than perhaps two or five years of work record it would conform to equal protection standards. But the drawing of such lines has been regarded by this Court as properly within legislative discretion. In *Marshall v. United States*, 414 U.S. 417 (1974), *supra*, it was stated:

The Court has frequently noted that legislative classifications need not be perfect or ideal. The line drawn by Congress at two felonies, for example, might, with as much soundness, have been drawn instead at one, but this was for legislative, not judicial choice. *McGinnis v. Royster*, 410 U.S. 263 (1973). [414 U.S. at 428.]

In this regard it should additionally be noted that the line drawn by the ordinance is not between those eligible for the license and those not eligible but rather between those entitled to a hearing and those denied a hearing. Thus although incumbent licensees may obtain a hearing after a conviction it must be supposed that the

licensing authority who hears the presentation of a licensee will attach little significance to a brief employment record in weighing it against the conviction. Consequently, such a short term licensee will gain little of substance as a result of his hearing opportunity.

For all of these reasons it is submitted that there are substantial differences between the situations of applicants and licensees which provide a rational justification for the procedurally different treatment afforded the two classes.

The Court of Appeals applied a rational basis test in its examination of the subject ordinance. Judge Campbell considered in some detail the appropriate equal protection standard to be applied (App. p. 28-33) and also concluded that, because no fundamental right was affected and because no suspect class was involved, the ordinance should be measured by the traditional rational basis standard. Petitioner, of course, agrees fully with these conclusions and submits that the equal protection standard laid down in *Dandridge v. Williams*, 397 U.S. 471 (1970) is applicable.

[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all . . . It is enough that the States' action be rationally based and free from invidious discrimination.

For the reasons discussed *supra* the subject ordinance meets this standard.

## II.

### THE ORDINANCE DOES NOT DENY DUE PROCESS.

The Court of Appeals, in rejecting the distinction based upon a property interest in licensees, appears to have concluded that a denial of equal protection resulted

simply because it believed that among the class of ex-offenders some received due process and others did not. The court stated:

Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment. [App. p. 21]

The ordinance provides that all ex-offenders are subject to denial of a license for an armed felony conviction. The ordinance differentiates among ex-offenders in that it affords some (licensees) an "individualized hearing" which it does not grant to others (applicants), who are "automatically disqualified." The Court of Appeals concludes, therefore, that the result is a denial of equal protection to applicants.

The rationale of the Court of Appeals is troublesome in several respects. First, denial of equal protection as a consequence of a denial of due process is a complex and apparently novel proposition. The Court of Appeals has not suggested any authority for this approach and petitioner's research similarly has disclosed none. Second, it appears to be a needlessly indirect analysis for if the applicant's due process rights were denied by the

refusal to provide him an individualized hearing then the Constitution would require that he be given the hearing regardless of whether a hearing is provided for incumbent licensees. Judge Campbell's concurring opinion (App. pp. 26-45) straightforwardly addresses this due process issue and reaches the conclusion that the applicant was denied due process because the ordinance embodies an irrebuttable presumption. And, indeed, certain of Judge Campbell's conclusions appear to have figured in the reasoning of the per curiam opinion. Consequently, although the opinion claims to eschew due process issues and speaks in equal protection terms any discussion of the opinion appears incomplete without reference to the underlying due process considerations. For the convenience of this Court Petitioner accordingly submits his views on the due process ramifications of the case.

In order to determine whether due process has been denied the due process interest at stake must be identified and the procedures affecting it analyzed to determine whether it has been adequately protected. As this Court declared in *Board of Regents v. Roth*, 408 U.S. 564 (1972), at 569, "the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property". It is apparent for reasons already discussed (*supra* pp. 10-13) that applicants, by definition, have no property interest in a license which they have never held and for which they have not previously qualified. Thus, if applicants have any due process interest at stake it must necessarily be a "liberty" interest.

In refusing an applicant a license for the reason of a previous conviction the City does not impose upon him any stigma. The conviction upon which the denial is premised is a public record and the action of the licensing authority can neither add to, nor subtract from, the

stigma attached to that conviction. Nor does the denial of a cab-operator's license restrict the mobility of the applicant for it does not affect his opportunity to drive a private vehicle. Indeed it does not even deny the applicant the opportunity to operate a taxi in any place other than the City of Chicago.

Thus, the interest at stake is nothing more than an opportunity to drive a taxi within the City of Chicago and the due process issue is whether the ordinance which deprives the applicant of that narrow and specific opportunity on the basis of a conviction for an armed felony is procedurally adequate.

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court upheld provisions of the Social Security Act which conclusively denied survivors benefits to widows who married the wage earner less than nine months prior to his death. The district court, declaring that the statute relied upon an irrebuttable presumption that marriages entered less than nine months prior to the wage earner's death were shams aimed only at the procurement of Social Security benefits, held the provision violative of due process. This Court, in reversing, observed that extension of the holdings of previous decisions into the area of social welfare legislation. ". . . would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." (422 U.S. 749, at 772) The Court, in declining to apply the irrebuttable presumption test which had been applied in previous decisions quoted (422 U.S. 749 at 773) from *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) at 489:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition.

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.

Although the opinion in *Salfi* specifically dealt with welfare legislation its reasoning bears with no less force upon the licensing ordinance here in question. As was observed *supra* pp. 13-15, the conclusive bar against convicted applicants is not merely an administrative convenience but, more importantly, reflects the difficulties of reliably predicting the rehabilitation of convicted armed felons. Moreover, the interest at stake, the protection of vulnerable taxi passengers from drivers of violent disposition, is of a very high order. For these reasons it is submitted that the conclusion of *Salfi* should be controlling:

There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations out weigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce. [422 U.S. 749 at 785.]

However, even if the rationale of *Salfi* is not deemed applicable in the area of employment licensing and more rigorous standards are applied petitioner submits that the ordinance here before the court is not violative of due process.

In *DeVeau v. Braisted*, 363 U.S. 144 (1960), this Court upheld the constitutionality of the New York Waterfront Commission Act which among other things provided that "past convictions for certain felonies constitute specific disabilities for each occupation, with discretion in the Commission to lift the disability, except in the case of port watchmen, where it constitutes an absolute bar to waterfront employment." (363 U.S. 144, at 149.) This Court declared:

Duly mindful as we are of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts, it is not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed.

Barring convicted felons from certain employment is a familiar legislative device to insure against corruption in specified vital areas. [363 U.S. 158-159].

The opinion enumerated a variety of employments and occupations from which criminally convicted offenders are barred. (363 U.S. 159). This Court found such statutory bars to result in no denial of Fourteenth Amendment due process rights.

The significance of *DeVeau* is perhaps best appreciated when that decision is contrasted with the decision in *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). *Schwartz* was denied permission to take the New Mexico bar examination because of a history of Communist Party affiliation and labor movement arrests. This Court declared:

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. [353 U.S. 238-239.]

The Court observed that although a state may require high standards of qualification such as good moral character ". . . any qualifications must have a rational connection with the applicant's fitness or capacity. . ." (353 U.S. 239). The Court also stated:

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows

nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated. [353 U.S. 241]

Two critical defects thus were recognized in the considerations upon which the New Mexico bar examiners denied *Schwartz* entrance to the legal profession. First was the irrationality of an inference of unfitness from the facts relied upon; and second was the questionable fashion in which those facts had been established.

These criteria appear to underlie virtually all of the decisions which have invalidated statutory irrebuttable presumptions. The questionable nature in which the statutorily specified fact was determined certainly explains the decision in *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), which the Court of Appeals cited (App. pp. 19-20) in its opinion in the instant case. Freitag, also an applicant for a cab operator's license, was denied the license without a hearing when Commissioner Carter's investigation disclosed that Freitag had once been confined in a state mental hospital. The ordinance required that an applicant be free of an "infirmity. . . of mind" in order to qualify. (489 F.2d 1377, 1379.) Although Freitag had been a patient in a mental institution there was no indication that he had at any time been either judicially or medically declared insane or mentally infirm. Accordingly, he had at no time had a procedural opportunity to establish a lack of mental infirmity. Moreover, the inference of unfitness based upon a previous mental illness was irrational in that it reflected "an archaic attitude in the field of mental health." (489 F.2d 1377, at 1380.)

In *Bell v. Burson*, 402 U.S. 535 (1971), on the other hand, the statutorily specified fact was not in question but the inference based upon it was illogical. There a

motorist's driving license was summarily suspended after he was involved in an accident and failed to post bond for damages. This Court held that the statute which presumed fault or liability, without any evidentiary hearing, violated the driver's due process rights. Clearly guilt or fault could not rationally be inferred from the mere fact of involvement in an accident.

Similarly, in *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held violative of due process an Illinois statute which irrebuttably presumed illegitimate fathers to be unfit parents. The Court clearly believed that unfitness could not be rationally inferred from the mere fact of unmarried paternity saying:

"[It may be that] . . . most unmarried fathers are unsuitable and neglectful parents. . . but all unmarried fathers are not in this category; some are wholly suited to have custody of their children." [404 U.S. 645, at 654.]

In *Vlandis v. Kline*, 412 U.S. 441 (1973), the Court held unconstitutional a Connecticut statute which irrebuttably presumed any unmarried student to be a non-resident if he had had a legal address outside the state for any part of the year preceding his application for admission. The Court found the presumption based on the provisions of the statute to be "so arbitrary as to constitute a denial of due process." (412 U.S. 441 at 450.) The Court cited numerous instances in which the presumption bore no rational relation either to intent to remain resident in Connecticut or to having had a long residential status in the state.

The results in *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973), and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), are explicable on the same grounds. In *Murry* this Court found a denial of due process in a provision of

the Food Stamp Act which made ineligible for food stamp assistance any household "which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household. . . during the tax period such dependency is claimed and for a period of one year after the expiration of such tax period." The Court acknowledged the propriety of the statute's purpose which was exclusion from participation in food stamp benefits of the unneedy, especially college students and the children of financially secure parents. But the Court concluded that a "deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact." (413 U.S. 508 at 514).

In *Moreno* the Court invalidated a statutory exclusion from food stamp assistance of "any household containing an individual who is unrelated to any other member of the household." (413 U.S. 528 at 529.) The Court found the measure, which was purportedly intended to eliminate fraudulent participants from the food stamp program to be "wholly without any rational basis" and therefore invalid under the Due Process Clause of the Fifth Amendment. (413 U.S. 528 at 528.) The Court clearly believed, as the facts of the cases before it illustrated, that the presence of an unrelated individual in the same household did not rationally support an inference of any type of fraud.

And in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) the Court held rules which irrebuttably presumed inability to work due to

pregnancy to be violative of due process. In both cases the Court noted that inability of a pregnant woman to work was highly individual and that it could not reasonably be inferred that a woman was incapable for any arbitrarily fixed period of time simply because she is pregnant.

Thus it can be seen that irrebuttable presumptions have failed to meet due process requirements where either or both of two factors appear. If the statutory presumption (e.g., unfitness to practice law) is not inevitably implied by the statutorily specified fact (such as previous unorthodox political affiliations) then the statutory presumption has been found irrational. Or, second, if the statutorily specified fact is itself established in a way which is so procedurally deficient as to render its truthfulness suspect then, also, the measure denies due process.

The ordinance here before the Court is subject to neither of these infirmities. The Court of Appeals has not found that the commission of an armed felony is not highly indicative of unfitness for the duties of a cab driver. As Judge Campbell's concurring opinion states:

There is also a rational basis for considering an applicant's prior criminal record in determining whether he is a person of good character, worthy of being entrusted with the responsibilities of a public chauffeur. The past conduct of an applicant may be the best indicator of his present character and his future actions. [App. p. 32.]

It could hardly be concluded that proof of specific criminal actions cannot be legislatively recognized as absolutely disqualifying for certain employments. See *DeVeau v. Braisted*, 363 U.S. 144 (1960), *supra* pp. 20-21.

Clearly also, the ordinance is not defective in relying upon criminal convictions as demonstrative of criminal acts. One who has been convicted in a criminal trial, unlike one who has merely been arrested, as in *Schware, supra*, cannot complain that the fact of his commission of the offense has been established in a procedural manner inconsistent with the Due Process Clause.

It may also be argued that the possible remoteness in time of the conviction from the application for the license undermines the validity of the conclusion of continuing unfitness and that some limitation on the period of unfitness stemming from a conviction should be fixed. However as was noted *supra*, p. 15 this Court has consistently held that fixing of such boundaries is properly a legislative function. See *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Marshall v. United States*, 414 U.S. 417 (1974), and *McGinnis v. Royster*, 410 U.S. 263 (1973). Whether the commission of an armed felony ceases to support an inference of unfitness after five years or ten years or persists indefinitely is necessarily a somewhat arbitrary decision. It would be no less arbitrary if decided by the courts.

As noted *supra* p. 18, the interest of a convicted applicant is narrow and consists solely of an opportunity to operate a taxi in the City of Chicago. The governmental interest at stake is the safety of taxi passengers who, having no ability to make an informed selection in their choice of drivers, must rely upon the City's licensing standards for their security. The City's ordinance discharges this responsibility by disqualifying those applicants whose disposition for violence has been established through a criminal trial. Even when measured against the strict standards of the irrebuttable presumption test no denial of due process results.

## CONCLUSION

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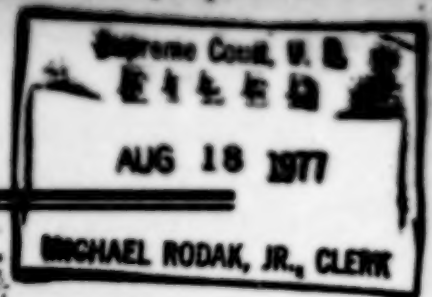
For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals, should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 76-1171



**In the**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1977**

**JAMES Y. CARTER**, Public Vehicle License Commissioner  
of the City of Chicago,  
*Petitioner,*  
**vs.**

**LUTHER MILLER**, on his own behalf and on behalf of all  
others similarly situated,  
*Respondent.*

**On Writ of Certiorari To The United States Court of Appeals  
for the Seventh Circuit**

**BRIEF OF RESPONDENT**

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**PETITION FOR CERTIORARI FILED**  
**FEBRUARY 24, 1977**

**CERTIORARI GRANTED APRIL 18, 1977**

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

**No. 76-1171**

**JAMES Y. CARTER**, Public Vehicle License Commissioner  
of the City of Chicago,

*Petitioner,*

**vs.**

**LUTHER MILLER**, on his own behalf and on behalf of all  
others similarly situated,

*Respondent.*

On Writ of Certiorari To The United States Court of Appeals  
for the Seventh Circuit

## **BRIEF OF RESPONDENT**

### **ISSUES PRESENTED**

1. Whether an ordinance which precludes from consideration for licensure during his entire lifetime a person once convicted of an offense involving the use of a deadly weapon, but which provides for the continuing licensure of present licensees recently convicted of the same offense, and of other applicants or licensees convicted of equally or more serious or more job-related offenses, violates respondent's rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether an ordinance which irrebuttably and permanently presumes that an applicant is unfit for licensure because he was once convicted of an offense violates respondent's rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.

## STATEMENT OF THE CASE

Luther Miller is an ex-offender. As a young man in 1965, he was convicted of armed robbery. After serving seven years in prison, he was released on parole in February, 1972, and, 18 months thereafter, having complied with all its terms and conditions, was unconditionally discharged.

In September, 1974, Miller tried to apply for a Chicago public chauffeur's license as a preliminary step to seeking private employment as a taxi-cab, transit or ambulance driver. However, upon informing an agent of the Public Vehicle License Commission that he had once been convicted of armed robbery, his application was denied. The agent relied upon the licensing ordinance at issue here, writing: "Anyone convicted of armed robbery may not apply." (App., at 10). Thereafter, Luther Miller filed suit in district court to vindicate his rights as guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

### 1. The Ordinance

Chapter 28.1-2 of the Municipal Code of the City of Chicago (hereinafter "Code") makes a public chauffeur's license a prerequisite for any person wishing to be employed "transporting . . . passengers for hire." Included within its ambit are persons who wish to drive a bus or rapid transit, a taxi-cab, or an ambulance (Code, Ch.103-12) in the City of Chicago. All applications for the license are made to the defendant Commissioner. (Ch.28.1-3). The Commissioner may require from the applicant any information pertaining to his "character, reputation, physical qualifications, past employment and conduct" deemed relevant to qualification for a chauffeur's license. In addition, the applicant must be in good physical health and "not be addicted to the use of drugs or intoxicating liquors." (Ch.28.1-3).

The Commissioner submits the name of the applicant to the captain of the police district in which the applicant

resides, for an investigation into the "character and reputation" of the applicant. (Ch.28.1-4). In order to aid the police investigation, the applicant's fingerprints and photograph are submitted to the commissioner of police. The police then submit their report to Carter, who approves or disapproves the application:

If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license. Ch.28.1-4.

Thus, the ordinance grants the Public Vehicle License Commissioner broad investigative power before final approval of any license applicant for a chauffeur's license, as well as discretion in determining whether the applicant is a "suitable" person for licensure.

No such system of individualized assessment applies in the case of ex-offenders such as Miller. The Commissioner may not approve the application of a person who has been convicted of an offense involving the use of a deadly weapon. Chapter 28.1-3 provides, in relevant part:

No public chauffeur's license shall be issued to any person who has been convicted of a felony or any criminal offense involving moral turpitude within eight years prior to his application for such license, excepting only if such person shall have received, since the time of his conviction, an honorable discharge from any branch of the armed services of the United States of America, and if, in the discretion of the public vehicle license commissioner, such person is trustworthy of the responsibility imposed by the issuance of such license. *No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape. (Emphasis added.)*

It is the constitutionality of the emphasized portion of this section which is at issue in the case at bar.

An additional section of the Code (Chapter 101 *et seq.*) governs the administration of all licensing ordinances within the City of Chicago, including the Public Chauffeur's Ordinance. If a license application is denied after an investigation into an applicant's "character or fitness," Ch.101-5 provides that the applicant "shall be notified, in writing, of the reasons for the disapproval." He may then request a hearing on the disapproved application. Similarly, those already licensed may request a hearing if their license is revoked. (Ch.101-27).

## 2. Decisions of the Lower Courts

The district court granted the Commissioner's motion to dismiss in a short memorandum opinion. (App., at 15-16). The court found the ordinance was rationally related to a legitimate public purpose, and that the provision absolutely precluding Miller's licensure was rational.

The Court of Appeals reversed. It began its decision with an analysis of the provisions of the ordinance itself. The court noted that although each applicant must satisfy a "good character and reputation" investigation, nonetheless the defendant Commissioner is not allowed to issue a license to persons such as Miller who were once convicted of certain disabling offenses. The ordinance also specifies standards of conduct for licensure, including acts which may lead to the revocation of a license. Ch.28.1-10 provides that the violation of "any criminal law, which, if convicted for such offense, would disqualify any applicant for a chauffeur's license" is an element which may lead to revocation, at the discretion of first the Commissioner and then the mayor. Thus, said the Court of Appeals:

[P]laintiff Miller is absolutely barred from obtaining a license, although he was convicted of armed robbery over eleven years ago, while someone who already holds a license may be permitted to retain it, although convicted of armed robbery only yesterday. (App., at 20).

The court found the Commissioner's "purported justification" for this different treatment of similarly situated persons wholly unpersuasive. Rejecting his argument that the licensees' "track record" explains the distinction, the court reasoned:

The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. However, one who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would, according to the ordinance, also be eligible to retain the license, for under Ch.28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation. (App., at 20-21).

Concluding that "such distinctions among those members of the class of ex-offenders are irrational," the court held that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment.

The majority of the panel, holding the ordinance invalid on equal protection grounds, found it unnecessary to reach

plaintiff's due process arguments, although it did discuss them. Judge Campbell, concurring, did reach the due process issue, however, concluding:

Due process considerations require only that the applicant be given a meaningful opportunity to present evidence of good character and fitness in contravention of any contrary inference based upon his prior conduct. (App., at 45).

Since the ordinance prohibits such consideration, Judge Campbell concluded that Luther Miller's rights as guaranteed by the Due Process Clause were also violated.

### SUMMARY OF THE ARGUMENT

Luther Miller was denied, and is permanently barred from obtaining, a public chauffeur's license because twelve years ago he was "convicted of an offense involving the use of a deadly weapon." Chapter 28.1-3, Municipal Code of Chicago. This provision imposes a life-time bar to the licensure of certain ex-offenders.

The ordinance at issue in this case is a criss-cross of irrational discriminations, and has been found to be so by both federal and state courts. *See, e.g., Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977); *Roth v. Daley*, 119 Ill.App.2d 462, 256 N.E.2d 166 (1970). Luther Miller and others convicted of a misdemeanor or felony "involving the use of a deadly weapon" are barred for life from obtaining a public chauffeur's license. The Commissioner is thus precluded from even considering their present fitness for a license. At the same time, the following groups can obtain or retain licenses:

(a) persons with existing licenses who have recently committed the same crime as Miller committed in the past;

(b) applicants or licensees who have committed even more serious crimes than Miller, or who have bad driving records, or who have committed crimes while using cars (or taxi-cabs);

(c) applicants or licensees for essentially any other profession licensed by the State of Illinois or the City of Chicago.

Moreover, no theoretical or actual difference exists between Miller and the other groups described above which can justify the disparate treatment. Whatever degree of difference exists does not support the absolute extent of differing treatment provided. Luther Miller may never be considered for licensure, and is forever denied an individualized determination of his fitness, no matter how old his crime or good his character. For all others, past or current illegal conduct is only one factor in an over-all evaluation of fitness for licensure. As part of that evaluation, each is entitled to have his present fitness considered. This gross disparity is at the heart of the unconstitutional inequality visited upon Miller and others like him. *See, e.g., James v. Strange*, 407 U.S. 128 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966). The unconstitutionality of the ordinance is heightened where, as here, the class being discriminated against is a discrete and insular minority.

Furthermore, for all license applicants but Miller and the few like him, the Commissioner evaluates "character and fitness." This includes weighing evidence of past illegal conduct, history of employment, character and reputation, and ability to perform as a public chauffeur. This focused inquiry into fitness for licensure is necessary and appropriate under this Court's decisions, especially where the licensure affects access to a broad field of private employment or common occupation. *See, e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Sugarman v. Dougall*, 413 U.S. 634 (1973). A licensing ordinance which precludes focused inquiry into the present fitness of a small group while providing such inquiry to all others, including many similarly situated, is irrationally under- and over-inclusive.

Both federal and state courts applying these principles have found the ordinance at issue here to be irrational. Its irrationality stems from the disproportionate treatment given certain ex-offenders as compared to those licensees who have committed the same crimes more recently but face no absolute and/or permanent exclusion. *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977). Moreover, as the Illinois Appellate Court has found, the categorization of crimes in the ordinance is irrational, since more serious crimes than Miller's do not lead to the same kind of exclusion. *Roth v. Daley, supra*. These irrationalities are heightened by the facts that: no exclusion flows from more job-related crimes; Chicago and Illinois have no similar lifetime exclusions for other types of licensed employment which are related to public safety; and other cities have not enacted lifetime bans on ex-offenders in public chauffeur licensing ordinances.

Despite the criss-cross of irrational classifications, the Commissioner ignores all but the distinction between licensees and applicants, and defends it solely on the grounds that existing licensees' "track records" are greater. But under the scheme at issue, licensees actually may not even be working as public chauffeurs, and so they therefore have neither track records nor substantial interests in their licenses. Moreover, applicants such as Miller have an employment and fitness history after their conviction upon which to evaluate fitness, whereas licensees can be evaluated only by information which pre-dates their more recent convictions. The "track record" argument, therefore, as the Court of Appeals found, reverses reality. Since the ordinance is allegedly predicated upon the fact that conviction of a specified offense alone justifies a lifetime exclusion, the Commissioner's "track record" argument ignores what he claims to be the key element, since he continues to license those with no history between themselves and the conviction, while refusing

to license applicants who may have a long post-conviction history of responsible, crime-free behavior.

Even if licensees have a greater interest in their licenses than applicants do in receiving one, in a licensing ordinance controlling access to common private employment the degree of differing treatment visited upon the two similarly situated groups is irrational. Miller's fitness may not be considered and he is permanently barred from licensure, whereas the licensee is entitled to immediate and full consideration.

Measured against the clearly established principles of the Equal Protection Clause of the Fourteenth Amendment, the ordinance prohibiting the licensure of Luther Miller for life must be struck down.

The ordinance also embodies an irrebuttable presumption that Miller is forever unfit, which violates due process. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972). The barrier to licensure is based on a presumption that is both conclusive and life long. This absolute barrier exists for a few, excluding them from common private occupations and therefore, the important right to work, even while there exists a mechanism for evaluating the fitness of other applicants and licensees generally. This mechanism for all other applicants and licensees is explicitly designed to judge the same elements of character and fitness which underpin the exclusion of Miller. Under these circumstances the irrebuttable presumption is irrational and violates due process.

## ARGUMENT

### I. This Court's Opinions Establish That A Licensing Ordinance Must Be Rationally Based And Sufficiently Focused On Present Fitness In Its Treatment Of Ex-Offenders.

#### A. A Number of Recent Decisions of This Court Have Struck Down Over- and Under-Inclusive Classifications Similar to Those Created by the Ordinance At Issue.

It is well established that the Equal Protection Clause prohibits arbitrary discrimination between similarly situated persons.

[T]he classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

See also *Reed v. Reed*, 404 U.S. 71 (1971).

A number of recent decisions of this Court have declared as invalid classifications similar in many respects to those created by the ordinance here. In doing so, the Court has not necessarily used an outcome-predictive categorization, such as "suspect class." Rather, it has assessed whether the disparity in treatment between two otherwise virtually identical groups has a reasonable basis in light of the purposes of the statutory scheme.

Thus, in *James v. Strange*, 407 U.S. 128 (1972), this Court unanimously declared unconstitutional a Kansas provision requiring defendants to repay the state for services provided them in defense of a criminal action, insofar as such defendants were deprived of the same exemptions (e.g., limitations with respect to wage garnishments) afforded other judgment debtors. Although recognizing that the state's

claim to reimbursement might take precedence over other creditors, the Court held this differentiation between debtors violated the Equal Protection Clause, because like groups—neither of which were suspect, and neither of which were being deprived of a fundamental interest—were being exposed to vastly disparate treatment:

The indigent defendant who is found guilty is uniquely disadvantaged in terms of the practical operation of the statute. A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served. It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship. There is limited incentive to seek legitimate employment when, after serving a sentence during which interest has accumulated on the indebtedness for legal services, the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions. 407 U.S. at 139.

Sensitive to the status of the plaintiff, and finding inadequate basis for the considerable differential treatment, the Court concluded that the law embodied "elements of punitiveness and discrimination" which violated rights guaranteed by the Fourteenth Amendment, despite the admitted state interest in recoupment. 407 U.S. at 142.

*James v. Strange* did not require that defendants and others be treated identically, but only more evenly; it was the disproportionately disparate treatment which violated the guarantees of equal protection. Similarly, in *Baxstrom v. Herold*, 383 U.S. 107 (1966), where there were also substantially different interests as between those in prison who may be mentally ill and those who were not yet in custody who would face an initial deprivation of liberty due to commitment, this Court held:

Where the state has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term. It may or may not be true that Baxstrom is presently mentally ill and such a danger that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands Baxstrom receive the same. 383 U.S. at 114-15.

See also *O'Brien v. Skinner*, 414 U.S. 524 (1974), declaring violative of equal protection guarantees a system denying pre-trial detainees the right to vote when other such detainees located out of their home county could vote by absentee ballot; *Rinaldi v. Yeager*, 384 U.S. 305 (1966), declaring unconstitutional a scheme requiring indigent incarcerated persons, but not indigent persons who are not incarcerated, to pay for appellate transcripts.

In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Court struck down as both over- and under-inclusive a classification whereby illegitimate children born prior to the onset of a parent's disability were eligible for Social Security benefits, whereas after-born children were normally deemed ineligible. The government insisted that the classification was necessary to prevent fraudulent claims, but this Court disagreed.

It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of afterborn illegitimates

without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses. 417 U.S. at 636.

Thus, over-inclusive and under-inclusive classifications, classifications with a disproportionate and unfair impact on the burdened group, given the governmental interest, classifications which do not rationally further a legitimate governmental interest, cannot withstand Fourteenth Amendment scrutiny. As discussed below, the ordinance here suffers from all these flaws.

#### B. Ex-Offenders Constitute a Discrete and Insular Minority.

In each of the decisions discussed at some length above, the class of persons ultimately protected by the Court belonged to a politically vulnerable and/or traditionally disadvantaged group<sup>1</sup>. As such, the decisions are consistent with the special responsibility recognized long ago by this Court to scrutinize carefully laws directed against a "discrete and insular" minority. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938):

[P]rejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

In *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973), and *In re Griffiths*, 413 U.S. 717, 721 (1973), this Court held that resident aliens were a "discrete and insular" minority. The law at issue in *Sugarman* indiscriminately disqualified

<sup>1</sup> *James v. Strange*, 407 U.S. 128 (1972), ex-offenders; *Baxstrom v. Herold*, 383 U.S. 107 (1966), prisoners; *Jimenez v. Weinberger*, 417 U.S. 628 (1974), illegitimate children.

aliens from a significant number of jobs, ranging from typists and office workers to persons who directly participate in the formulation and execution of important state policy. 413 U.S. at 643. *In re Griffiths* was explicit about the past and present discrimination affecting aliens:

In subsequent decades, wide ranging restrictions for the first time began to impair significantly the efforts of aliens to earn a livelihood in their chosen occupations. 413 U.S. at 719.

Ex-offenders, very much like aliens, are a discrete and insular minority.<sup>2</sup> Upon completion of his sentence and re-entry into society, the convicted individual finds that numerous rights and opportunities are withheld by law or custom. The existence of widespread discrimination has been recognized by this Court<sup>3</sup> and by numerous commentators<sup>4</sup>, and

<sup>2</sup> Respondent recognizes that at other times this Court has equated a "discrete and insular minority" with a "suspect classification." *Sugarman v. Dougall*, 413 U.S. 634 (1973). Respondent is not arguing here that ex-offenders are a "suspect class". However, the Court's definition of a suspect class, as expressed in *Rodriguez v. San Antonio School District*, 411 U.S. 1, 28 (1973), and again in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), does bear a significant resemblance to the attributes of ex-offenders:

[A] suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the political process.

These factors should be weighed in scrutinizing the discrimination at issue in this case.

<sup>3</sup> *Benton v. Maryland*, 395 U.S. 784, 790 (1969); *Street v. New York*, 394 U.S. 576, 579 n.9 (1969); *Sibron v. New York*, 392 U.S. 40, 55 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 237-8 (1968); *Ginsberg v. New York*, 390 U.S. 629 (1968); *DeVeau v. Braisted*, 363 U.S. 144 (1960); *Trop v. Dulles*, 356 U.S. 86 (1958); *Firwick v. United States*, 329 U.S. 211 (1946).

has generally been condemned. For example, the 1967 President's Commission on Law Enforcement and Administration of Justice concluded:

As a general matter [the law in this area] has simply not been rationally designed to accommodate the varied interests of society and the individual convicted person. There has been little effort to evaluate the whole system of disabilities and disqualifications that has grown up. Little consideration has been given to the need for particular deprivations in particular cases. (Emphasis added). *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* at 89 (1967).<sup>5</sup>

The ordinance at issue here is just one small part of the systemic discrimination which affects ex-offenders. It represents the system at its most extreme, repressive and irrational.

The Vanderbilt Special Project, *supra* note 4, is the most exhaustive survey of the nature and extent of ex-offender disabilities. It concludes that civil disabilities in England were not only the outgrowth of the retributive and deterrent theories of the criminal justice system, but also of economic conditions which allowed for the exploitation of a segment—offenders—of an impoverished urban mass. Inasmuch as

<sup>4</sup> Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970) [hereinafter "Vanderbilt Special Project"]; Cohen, *Civil Disabilities: The Forgotten Punishment*, 35 Fed. Prob. 19 (June, 1971); Rubin, *Man With a Record: A Civil Rights Problem*, 35 Fed. Prob. 3 (Sept. 1971); Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, Part I, 59 J. Crim. L. 347 (1968); *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* (1967).

<sup>5</sup> See also the ABA Tentative Draft of Standards Relating to the Legal Status of Prisoners, 14 Am. Crim. L. Rev. 377 (1977).

America's legal heritage is an outgrowth of English jurisprudence, early civil disabilities in this country were "the result of the unquestioning adoption of the English penal system by our colonial forefathers and the succeeding generations who continued existing practices without evaluation." Vanderbilt Special Project, at 950. The origin of civil disabilities for ex-offenders was principally an attempt to isolate and condemn ex-offenders, thereby actually preventing them from reintegrating into the larger society.

In addition to occupational licensing restrictions, such as the one found in the case at bar, the scope of the discrimination visited upon ex-offenders is widespread.<sup>6</sup> Its effect is to render the ex-offender a second class citizen. Thus, for example, ex-felons have been denied the right to vote, *Richardson v. Ramirez*, 418 U.S. 24 (1974),<sup>7</sup> and denied the right to hold public office.<sup>8</sup> Ex-offenders are often excluded from private<sup>9</sup> and public<sup>10</sup> employment.<sup>11</sup> While every such restriction may not necessarily be irrational, the restrictions are widespread in both the private and public sectors and reflect a general societal attitude toward the ex-offender which does not allow for differentiation between specific societal needs and a more general impulse to ostracize ex-offenders.<sup>12</sup>

<sup>6</sup> See generally, Vanderbilt Special Project, *supra* note 4, at 967-1143 (1970).

<sup>7</sup> But see *Ramirez v. Brown*, 12 Cal.3d 912 (1975), 528 P.2d 378, 117 Cal. Rptr. 562 (1975); Ill. Rev. Stat., Ch. 38, § 1005-5-5(d), insuring ex-felons the right to vote.

<sup>8</sup> Vanderbilt Special Project, *supra* note 4, at 987. No prohibition exists in Chicago against ex-offenders holding public office.

<sup>9</sup> D. Glaser, *The Effectiveness of a Prison and Parole System* 311-401 (1964); G. Pownall, *Employment Problems of Released Prisoners* (Jan. 1969). See, however, *Green v. Missouri-Pacific Railroad Company*, 523 F.2d 1290 (8th Cir. 1975); Rovner-Piecznik, *Manpower Programs for the Offender* (April 1, 1976);

Prior to the end of the 19th century, very few occupations were subject to licensure requirements.<sup>13</sup> The situation is radically altered today. In 1974 the American Bar Association isolated over 4,000 state statutory provisions requiring occupational licenses covering "a variety of vocations, trades, professions and callings."<sup>14</sup> Over seven million per-

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Chamber of Commerce of the United States, *Marshaling Citizen Power to Modernize Corrections* 13-14 (1971).

<sup>10</sup> E.g., United States General Accounting Office, *Civil Service Commission Actions and Procedures Do Not Help Ex-Offenders Get Jobs With The Federal Government* (July 1, 1976).

<sup>11</sup> Vanderbilt Special Project, *supra* note 4, at 1001-1017. It is accepted that lack of employment, particularly immediately after release from prison, is a major cause of recidivism among ex-offenders. Glaser, *The Effectiveness of a Prison and Parole System* (1964); Toborg, *The Transition from Prison to Employment: An Assessment of Community-Based Assistance Programs* (May, 1977); Horowitz, *Back on the Street—From Prison to Poverty* (June, 1976). See generally, American Bar Association, *Removing Offender Employment Restrictions* (March, 1976). The social disutility of the restrictions is principally responsible for the ABA coordinated attack upon ex-offender restrictions. See also Burger, *Thoughts on Prison Reform: The Corrections Addresses of the Chief Justice of the United States, 1970-1975* (Sept., 1975).

<sup>12</sup> This attitude was touched upon by Chief Justice Burger in his speech to the Midwinter Meeting of the American Bar Association (Feb., 1970) when, speaking of our society's failure to successfully reintegrate the ex-offender, he said:

If we want prisoners to change, public attitudes towards prisoners and former prisoners must change. We have some community efforts along these lines in this country, but with few exceptions it is thin, scattered and not well-led or organized.

<sup>13</sup> W. Gellhorn, *Individual Freedom and Governmental Restraints* (1956); *In re Griffiths*, 413 U.S. 717, 719 (1973).

<sup>14</sup> Hunt, Bowers, Miller, *Laws, Licenses, and the Offender's Right to Work*, ABA (1974), at 4. The 4,000 figure does not include local ordinances, such as the one at issue here.

sons worked in licensed occupations, as of 1969<sup>15</sup>. At least one commentator has explained this huge growth of licensure as a result of the pressure of the present members of an occupation for both status and as a means of limiting the entry of others into their occupation<sup>16</sup>. As a result of this process, licensing provisions tend to be enacted piecemeal, without any attempt to embody a uniform philosophy or policy towards ex-offenders<sup>17</sup>. Thus, ex-offenders are subject to unreasonable and unreasoned exclusion from entry into licensed occupations.

The ex-offender is a member of a discrete and insular minority. He is discriminated against and excluded from the political process. He is also generally poor<sup>18</sup> and often a member of a minority<sup>19</sup> racial group. Above all else, he is an outcast, having transgressed the bounds of acceptable behavior. For these reasons ex-offenders are politically powerless to affect the widespread, often irrational, discrimination

<sup>15</sup> *Ibid.*, relying upon *Occupational Licensing and the Supply of Non-Professional Manpower*, Report to Manpower Administration, U.S. Department of Labor, Manpower Administration, Monograph No. 111 (1969).

<sup>16</sup> W. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 (1976).

<sup>17</sup> Some of the resulting inconsistency noted above has been mitigated in recent years. As reported by the Clearinghouse on Offender Employment Restrictions, *Report on 1977 State Legislative Action to Remove Offender Job Restrictions*, ABA (1977), by the end of 1976 23 states had taken action to alleviate job barriers for ex-offenders.

<sup>18</sup> R. Horowitz, *Back on the Street—From Prison to Poverty*, American Bar Association, June, 1976.

<sup>19</sup> U.S. Department of Labor, *Unlocking the Second Gate, The Role of Financial Assistance in Reducing Recidivism Among Ex-Prisoners* (1977).

visited upon them<sup>20</sup>. Inasmuch as ex-offenders as a group are a "discrete and insular minority," this Court must look carefully at ordinances such as the one in the case at bar to insure that they do not violate the dictates of the Equal Protection and Due Process Clauses of the Fourteen Amendment.

Nor does the fact that ex-offenders have committed criminal acts in the past in any way mitigate this Court's responsibility for careful scrutiny. Whether under the Equal Protection Clause, *James v. Strange*, 407 U.S. 128 (1972), *Baxstrom v. Herold*, 383 U.S. 107 (1966), or the Due Process Clause, *Wolff v. McDonnell*, 418 U.S. 539 (1974), it is clear that the protection of the Constitution may not be withdrawn from persons because of their past transgressions.

C. Licensing Provisions Which Irrationally Fail to Establish a Sufficiently Focused Inquiry Into A Group of Applicants' Present Fitness Violate the Equal Protection Clause.

This Court has considered the constitutional legitimacy of a number of licensing provisions over the years. In applying equal protection principles, the Court has demanded that there exist a sufficiently focused inquiry into the present fitness of license applicants. This grows out of the undoubted importance of the individual's right to engage in the common occupations of life.

Insofar as a man is deprived of the right of labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords to those who are per-

<sup>20</sup> This Court has recognized in other contexts that there exist laws in our society which represent an archaic mode of thought. *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) (illegitimacy classifications); *Califano v. Goldfarb*, 97 S.Ct. 1021 (1977) (sex classifications).

mitted to work. *Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.* *Smith v. Texas*, 233 U.S. 630, 636 (1914). (Emphasis added).

See also *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Examining Board v. Flores de Otero*, 426 U.S. 572, 604 (1976).<sup>20A</sup>

Licensing provisions which restrict or prohibit licensure seriously impair that right, so that legislation which operates irrationally to exclude individuals from employment in common occupations because they are perceived unfit has come under careful scrutiny.

This is not to say that a licensing provision may not be based on objective qualifications or character traits.<sup>21</sup> *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), is typical of those cases where the objective criteria imposed for licensure were sufficiently focused upon fitness.

<sup>20A</sup> As Judge Campbell observed in his concurrence below:

The right to engage in a particular type of employment may not be a "fundamental right" for the purposes of the strict scrutiny test, but it is nevertheless a very important right. (App., at 44).

<sup>21</sup> Decisions such as *New Orleans v. Dukes*, 427 U.S. 297 (1976), are not relevant to this case. In *Dukes*, a grandfather provision of a vending license provision had the effect of excluding all but a few persons from work in the New Orleans Old Quarter. The ordinance was wholly unrelated to individual qualification; its purpose was to limit and eventually eliminate all vendors from the New Orleans Old Quarter so as to assure that the area retained its original French character. As a purely economic regulation, there was no need for any inquiry into an applicant's fitness. See also *Kotch v. Pilot Commissioners*, 330 U.S. 552 (1947) (limiting the number of persons who can become river boat pilots); *McGowan v. Maryland*, 366 U.S. 420 (1961) (prohibiting certain merchants from selling their wares on Sunday). The ordinance at issue here has no economic purpose.

In *Williamson*, only licensed optometrists and ophthalmologists were allowed to fit eyeglasses without a prescription, even though a prescription was sometimes unnecessary. Since opticians as a class were medically unqualified to write prescriptions, the public health would be endangered if glasses were fitted by opticians when a prescription was required. The regulation was therefore valid because "the legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify the regulation of the fitting of eyeglasses." 348 U.S. at 487. See also *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (prohibiting all but lawyers from engaging in the business of debt adjusting because debt adjusters' clients may very well need legal advice); *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949) (prohibiting insurance agents, because they were insurance agents, from also engaging in the funeral business, in order to avoid fraudulent collusion between the insurance and funeral businesses).

Moreover, to the degree that the above cases involve legislative judgments as to ability that are not universally true, the case holdings reflect the fact that the legislative judgments *define the functions* that are carried out by the occupation as a whole. In this respect, the cases are premised on significantly different factors from those cases which do not consider the scope of work of the occupation, but which rather consider the standards imposed for obtaining a license for access to the defined job, and whether such standards are sufficiently focused on job qualification, as well as evenly applied.

The leading case in this latter category is *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), holding that a licensing authority did not conduct a satisfactorily focused inquiry into fitness. In *Schware*, the license applicant had passed the bar exam and was in all other respects objectively

qualified to practice law as that job was defined in the state licensing law. Nonetheless, the bar examiners denied him a license because they felt that Schware's past conduct, although unrelated to his legal abilities, made him morally unfit to receive a license. The Court held:

[A]ny qualifications must have a rational connection with the applicant's fitness or capacity to practice law. [Citations omitted]. 353 U.S. at 239.

The Court proceeded, in light of this test, to examine in depth the three separate charges against the applicant—his use of an alias, his arrest record, and his prior membership in the Communist Party. In each instance, the Court found these past factors insufficient to establish the petitioner's present unworthiness for a license. Furthermore, said the Court, the cumulative weight of the three charges did not make the result any different: "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law."<sup>22</sup> 353 U.S. at 246-7. Thus, *Schware* establishes that the inquiry into fitness is insufficient unless it focuses on the present fitness of the applicant for licensure.

More recently, *In re Griffiths*, 413 U.S. 717 (1973), declared unconstitutional a Connecticut law which prohibited aliens from the practice of law. The state argued that alien lawyers might divide their loyalties between this country and another, and would therefore be unfit officers of the court. Although the Court rejected the state's claim as without foundation, it made the following important observation: "Nor would the possibility that some resident

<sup>22</sup> While *Schware* may be viewed as a due process decision, its analysis is equally appropriate under the Equal Protection Clause. *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J. concurring).

aliens are unsuited to the practice of law be a justification for a wholesale ban." 413 U.S. at 725. Indiscriminate barriers to licensure are contrary to the law. Citing *Schware*, *supra*, *In re Griffiths* reaffirmed that, even if a suspect classification had not been involved,

in applying permissible standards officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. 413 U.S. at 725.

The rationale for the decision in *Sugarman v. Dougall*, 413 U.S. 634 (1973), is the same as that in *In re Griffiths*: neither law's bar to licensing aliens allowed for a sufficiently focused inquiry into the fitness of individuals.

As a part of this inquiry, one must take into account the nature of the occupation. A higher degree of trust and competence is demanded from persons in professional callings<sup>23</sup> than in more common occupations. In *Sugarman*, New York State claimed that since its employees participate in the formulation and execution of government policy, they must be free from competing obligations to other countries. But New York's law excluding aliens applied to sanitation workers and clerks, as well as high governmental employees. As a consequence,

the State's broad prohibition of the employment of aliens applies to many positions with respect to which

<sup>23</sup> From a profession charged with such responsibilities there must "be exacted those qualities of truth-speaking, of a sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as moral character." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring). See also *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 766 (1976).

the State's proffered justification has little, if any, relationship.<sup>24</sup> 413 U.S. at 642.

*Sugarman* and *Griffiths* do not require that every individual be licensed. Each applicant must still satisfy generally applied rational criteria for eligibility. The cases do, however, reject irrational criteria restricting persons "from engaging in private enterprises and occupations which are otherwise legal." *Examining Board v. Flores de Otero*, 426 U.S. 572, 603 (1976). The decisions reflect a societal preference for allowing individuals to succeed on their own merit, within the marketplace, and free from artificial or discriminatory standards impeding success.

Thus, in cases which involve licensure of access to a broad field of private employment this Court has closely scrutinized licensing provisions which, rather than defining the functions of the licensed job or regulating for economic reasons, simply bar narrow groups of persons from access to the employment field based on sweeping concepts of personal fitness.

Decisions of lower federal and state courts have followed this Court's lead and refused to sanction such licensing restrictions or decisions which do not provide a sufficiently focused inquiry into the applicant's fitness for a defined field of employment.

Twice before, courts have considered Commissioner Carter's decision to deny a public chauffeur's license application. In *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), the United States Court of Appeals for the Seventh Circuit

<sup>24</sup> The constitutionality of the restrictions upon license applicants may also be affected by the degree of control which can be imposed upon them once a license is issued. See e.g. *In re Griffiths*, 413 U.S. 717, 727 (1973); *Examining Board v. Flores de Otero*, 426 U.S. 572, 606 (1976).

examined Commissioner Carter's denial of a license to an applicant who had had psychiatric treatment fourteen years before. Relying heavily upon *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), the court held that the defendant's failure to inquire into the applicant's present mental status "would appear to reflect an archaic attitude in the field of mental health," 489 F.2d at 1380, and affirmed the damage award of \$1,500.

Equally relevant is *Roth v. Daley*, 119 Ill.App.2d 462, 256 N.E.2d 166 (1970), where the Illinois Appellate Court found invalid the same ordinance provision as at issue here. Roth had been convicted of two counts of armed robbery in 1950 and was sentenced to prison. Thereafter he drove an ambulance for a number of years. When he applied for a license in 1967, the year the ordinance at issue here was made applicable to ambulance drivers, his application was refused, as required by the last sentence of Ch.28.1-3. The court focused on the fact that the ordinance would allow the licensure of felons convicted of murder, and other major crimes, but not of an armed robber like Roth:

In our opinion the provisions set forth in the last sentence in the last paragraph of 28.1-3 result in classifications which are unreasonable and arbitrary. Under these provisions an applicant who has perpetrated multiple murders by strangulation, poison and arson could be licensed, as could one who had been repeatedly convicted of Attempt to Rape, Burglary, Theft, Kidnapping or Aggravated Battery. In view of this fact, we fail to perceive in what manner the prohibition contained in the ordinance bears any relationship to public health or safety. In our opinion the circuit court correctly held this portion of the ordinance invalid as to the plaintiff. 119 Ill.App.2d at 468-69. (Emphasis added).

Thus, while recognizing that the city's police power to regulate occupations was broad, 119 Ill.App.2d at 468, the Court found this ordinance to be "manifestly unreasonable . . . arbitrary . . . and unrelated to the public purpose sought to be attained," 119 Ill.App.2d at 468,<sup>25</sup> its over- and under-inclusive terms operating so as to irrationally prohibit any inquiry into Roth's fitness for licensure.

*Beazer v. New York City Transit Authority*, Nos. 76-7295, 77-7092 (2nd Cir. June 22, 1977), is a recent and significant lower court decision. Plaintiffs in *Beazer* challenged the New York Transit Authority's blanket exclusion from employment of all persons participating in or having successfully concluded methadone maintenance programs. Affirming the trial court injunction against the rule, 399 F.Supp. 1032 (S.D.N.Y. 1975), the Second Circuit concluded that the evidence demonstrated that:

[A]fter a brief initial period of adjustment, many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures. (Slip Opinion, page 3).

Although not prohibited from adopting necessary regulations to ensure employability and to prevent employment in "safety sensitive" jobs, the transit authority was enjoined from applying its methadone rule. Relying heavily upon *Sugarman v. Dougall*, 413 U.S. 634 (1973), the court

<sup>25</sup> Indeed, Commissioner Carter has never explained why he continued to enforce the last sentence of Ch. 28.1-3, in view of the broad language of *Roth v. Daley*, *supra*. In light of an authoritative decision of a state appellate court holding the provision at issue here "arbitrary . . . and unrelated to the public purpose sought to be attained," this Court should consider dismissing certiorari as improvidently granted, or in the alternative remanding to the Court of Appeals for further consideration in light of *Roth v. Daley*.

held that the rule has "no rational relation to the demands of the jobs to be performed." (Slip Opinion, page 3).

A similar analysis was made in *Butts v. Nichols*, 381 F.Supp. 573 (S.D. Iowa 1974) (3-judge court), striking down an Iowa civil service employment disability, imposed upon ex-felons, as to civil service jobs and employment with the police and fire departments. The state justified the ban as a "protective one". The court admitted the validity of the purpose, but held that the means employed were impermissibly arbitrary, based on the irrational categories of crimes used to bar employment:

[The statute] is both over and under inclusive: persons who clearly serve the public interest are denied civil service jobs, while misdemeanants convicted of crimes involving a lack of probity suffer no disqualification. In short, no consideration is given to the nature and seriousness of the crime in relation to the job sought. The time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed are similarly ignored. 381 F.Supp. at 581.

The court in *Butts v. Nichols* also noted that the arbitrariness of the bar on all felons was greatly increased when compared to other laws where the proscription did not exist. An ex-felon in Iowa, for example, could hold the positions of city solicitor, treasurer, auditor, assessor, or city manager. Thus, said the court, the Iowa statutory scheme suffered from the defects of irrationality on two counts.<sup>26</sup>

<sup>26</sup> Other significant federal decisions include: *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976) (rule prohibiting hiring unwed parent for teaching position denies equal protection since those similarly situated and employed have a hearing before dismissal); *Thompson v. Gallagher*, 489 F.2d

## II. The Lifetime Exclusion Of Miller Is Irrational And Unjustified By Any Legitimate Governmental Interest.

### A. The Life Long Prohibition Against the Licensure of Certain Ex-Offenders Creates an Irrational Classification Disproportionately Burdening Mr. Miller and Others Like Him and Prohibiting any Inquiry into Their Present Fitness for Licensure.

Chapter 28.1-3 of the Municipal Code of the City of Chicago is arbitrary and irrational, and violates Luther Miller's right to the equal protection of the laws, because it does not provide for him a sufficiently focused inquiry—or any inquiry—into his fitness for licensure; the class to which Miller belongs—persons barred from licensure for life—is disadvantaged far out of proportion to others similarly situated who are entitled to an individualized determination of fitness. The result is the creation of irrational classifications which are by the ordinance's own terms both over- and under-inclusive. Forever excluding Mr. Miller from licensure is not related to any rational governmental purpose. Indeed, this ordinance is properly viewed as an

443, 449 (5th Cir. 1973) (rule prohibiting hiring person with dishonorable discharge for city job "without any consideration of the merits of each individual case irrational."); *Foster v. Mobile County Hospital Board*, 398 F.2d 227 (5th Cir. 1968) (regulations for admission to medical staff not rationally related to qualification); *Carr v. Thompson*, 384 F.Supp. 544 (W.D. N.Y. 1974) (several old criminal convictions probably not directly related to qualification as city employee); *Osterman v. Paulk*, 387 F.Supp. 669, 671 (S.D. Fla. 1974) (failure of city to hire clerk applicant unconstitutional because no rational nexus between off-duty or prior conduct—one marijuana conviction—and the duties of the job in question); *Pavone v. Louisiana State Board of Barber Examiners*, 364 F.Supp. 961 (E.D. La. 1973), *aff'd*, 505 F.2d 1022 (5th Cir. 1974); *Green v. Silver*, 207 F.Supp. 133 (D.D.C. 1962). State decisions include: *Cartwright v. Board of Chiropractic Examiners*, 16 Cal.3d 762, 548 P.2d 1134, 129 Cal. Rptr. 462 (1976) (en banc); *Miller v. D.C. Board of Appeals and Review*, 294 A.2d 365 (D.C. App. Ct. 1972); *Perrine v. Municipal Court*, 5 Cal.2d 656, 488 P.2d 648, 97 Cal. Rptr. 320 (1971).

atavistic remnant of the systemic discrimination typically visited upon ex-offenders, a system which both the City of Chicago and the State of Illinois have otherwise rejected. See notes 39, 40 *infra*, and accompanying text.

The irony is that the City of Chicago can hardly argue that such a Draconian scheme is necessary. The "character and reputation" of every other applicant for a public chauffeur's license is investigated prior to licensure. Ch. 28.1-4, Municipal Code of Chicago. After investigation, the Commissioner must "be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle" before issuing the license. Ch.28.1-3, Municipal Code of Chicago. Nonetheless, solely as a result of a twelve-year-old criminal conviction Mr. Miller is denied the same individualized inquiry into his character. It is presumed bad. Similarly, if an applicant for the license is denied, for whatever reason, he has a right to further individualized consideration in a hearing to contest that denial. Ch.101-5, Municipal Code of Chicago.<sup>27</sup>

<sup>27</sup> Chapter 101 of the Chicago Municipal Code establishes procedures for all license applicants and licensees. Chapter 101-5 provides, in relevant part that:

If the mayor disapproves the license application the unsuccessful applicant shall be notified in writing, of the reasons of the disapproval. The applicant may within 10 days after receiving notice of the disapproval make a request, in writing, to the mayor for a hearing on the disapproved application. Within 10 days after a request for hearing is made, a public hearing shall be authorized before a hearing examiner appointed by the mayor who shall report his findings to the mayor. The public hearing shall be commenced within 10 days after it is authorized. The mayor shall within 15 days after such hearing has been concluded, if he determines after such hearing, that the license application be disapproved, state the reason for such determination in written finding and shall serve a copy of such finding upon the license applicant.

See *Freitag v. Carter*, 489 F.2d 1377, 1383 (7th Cir. 1973), and discussion at n.44, *infra*.

Granted, Mr. Miller had a theoretical right to a hearing under the ordinance. However, the procedure would have been a meaningless sham, since the absolute prohibition against his licensure once again precluded any individualized determination of his fitness. Finally, licensees whose licenses are revoked, after the exercise of discretion by the Commissioner and then the mayor, Ch. 28.1-10, Municipal Code of Chicago, are also entitled to an individualized determination of their continued fitness for licensure. Ch. 101-27, Municipal Code of Chicago.

All persons except the few like Miller are entitled to an individual determination of fitness.<sup>28</sup> Luther Miller is never similarly evaluated. As far as the Commissioner is concerned, the remainder of his life is irrelevant. This differentiation is wholly out of proportion to the actual distinction which allegedly exists between Miller and others. The differing treatment is absolute, not one of degree. It operates like a meat ax for a few, while retaining the possibility of subtle flexibility for all others.

One aspect of this irrationality lies in the fact that while persons convicted of certain criminal offenses years ago may never be licensed, commission of the same offense by a licensee today does not result in the automatic loss of license. As stated by the Court of Appeals:

Thus, Plaintiff Miller is absolutely barred from obtaining a license, although he was convicted of armed robbery eleven years ago, while someone who already holds a license may be permitted to retain it, although convicted of armed robbery only yesterday. App., at 20.

On the basis of this irrational result, the Court of Appeals declared Ch.28.1-3 unconstitutional. The distinction throws

<sup>28</sup> Persons convicted of felonies other than those specifically mentioned in Ch. 28.1-3, and misdemeanors involving 'moral turpitude,' must wait eight years from conviction.

into sharp relief the requirement of the ordinance to consider the present fitness of licensees, as required by *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), contrasted with the absolute refusal to do the same for applicants with old convictions, even though the probative value of a recent criminal conviction is presumably much greater than is that of an old one. *Theard v. United States*, 354 U.S. 216 (1957); *Sherman v. United States*, 356 U.S. 369, 375-6 (1958).

Additionally, while Miller is excluded, a second group of offenders is included in the Commissioner's elaborate evaluative scheme—those who have committed more serious crimes. This element of irrationality was the basis on which the Illinois Appellate Court in *Roth v. Daley, supra*, reached the same result as the Seventh Circuit Court of Appeals.

Numerous very serious offenses, many directly related to vehicular use, do not result in an absolute bar to licensure. One example is kidnapping for the purpose of obtaining ransom, Ill.Rev.Stat., Ch.38, § 10-2(a)(1), a Class 1 felony, which could include use of a car. Ill.Rev.Stat., Ch.38, § 10-2(b). Involuntary manslaughter or reckless homicide, Ill.Rev.Stat., Ch.38, § 9-2, offenses which can be committed driving an automobile, are other serious felonies which are subject to no absolute permanent disability. Indeed, the list of offenses is very long. Thus, the licensing structure turns on the name of the offense for which one is convicted, even though the offenses are otherwise indistinguishable.<sup>29</sup> In one case, an individualized determination of

<sup>29</sup> In fact, it is irrational for the most part for a licensing system to condition licensure solely on the fact of a specific criminal conviction. First, it ignores the circumstances surrounding the offense. A person convicted of an offense involving the use of a deadly weapon growing out of personal disagreement where a weapon happened to be available must certainly be evaluated differently

fitness is offered immediately, or after eight years; in the other, no lapse of time allows for the same opportunity. The irrationality of this system is demonstrated by the fact that a person convicted of aggravated kidnapping may be considered for licensure 8 years after conviction. If he serves an 8 year sentence, he may walk out of prison and immediately receive full consideration. In contrast, Miller may have a demonstrated record of responsible citizenship spanning many years, but he remains ineligible for life.<sup>20</sup>

The same incongruity of treatment is evident between those absolutely barred from licensure and those who face no *per se* disqualification despite less serious, but more job-related, crimes. Persons with multiple traffic offenses, including driving while intoxicated, are eligible for licensure at any time, as are persons with a record of automobile accidents. Eighteen-year-olds with extensive juvenile records but no adult convictions are eligible for licensure, even though they also lack, by definition, significant experience as drivers and demonstrated records of responsibility at a job. The point is not that persons convicted of armed robbery are more or less qualified for a public chauffeur's

from someone convicted of a series of assaults upon strangers. Second, the plea bargaining system, which accounts for up to 95% of all criminal convictions, *Brady v. United States*, 397 U.S. 742, 752 (1970), makes it impossible to rely solely upon the name of an offense to which a person eventually pleads guilty to gauge the actual seriousness of the crime.

<sup>20</sup> In the confusion of statistics on recidivism, one fact is clearly established. If an ex-offender remains crime free for a number of years (4 to 7, depending on the study), the chances of his becoming a recidivist are statistically *de minimis*. See Kitchner, Schmidt & Glaser, *How Persistent is Post-Prison Success?* Fed. Prob. (March 1977); Wilkins, *Efficiency, Equity and the Clinical Approach to Offenders: Putting 'Treatment' on Trial*, The Hastings Center Report, Vol. 5, No. 1 (February, 1975).

license than, for example, drunk drivers. The irrationality exists because the former may never receive consideration, whereas the latter may at any time.

The irrationality of the categorization of offenses, as pointed out by *Roth v. Daley, supra*, is underlined by the vagueness of the main exclusionary offense. The ordinance provides that persons convicted of "an offense involving the use of a deadly weapon" may not be licensed. But there is no such offense in the Illinois Criminal Code, Ill.Rev. Stat., Ch. 38, §1 *et seq.*, and an examination of the criminal code demonstrates that an applicant may be forever denied a license for the commission of the most minor offenses. Section 24 of the Illinois Criminal Code, "Deadly Weapons," Ill.Rev.Stat., Ch. 38, §24, includes "Unlawful Use of Weapons," §§24-1 through 10, encompassing crimes which can be either misdemeanors or felonies, and punishable by anything from fine and probation to incarceration in the state penitentiary. Ill.Rev.Stat., Ch. 38, §1005-5-3.<sup>21</sup> This wide disparity in the perceived seriousness of crimes involving the use of deadly weapons is found throughout the Illinois Criminal Code.<sup>22</sup>

<sup>21</sup> The Commissioner's statement of the "Question Presented" (Petitioner's brief, page 2) is thus in error. He presents the issue in this case as: "Is an ordinance which conclusively denies issuance of a public chauffeur's license to any applicant convicted of certain armed felonies violative . . ." (Emphasis added). The prohibition does not apply only to ex-felons.

<sup>22</sup> Aggravated assault (Ch.38, §12-2) is a Class A misdemeanor and punishable by as little as a fine and not more than one year in jail; aggravated battery (Ch. 38, §12-4) is a Class 3 felony punishable by as little as probation or a maximum of one to ten years (Ch. 38, §1005-8-1); armed robbery (Ch.38, §18-2) is a Class 1 felony with a minimum term of four years; armed violence (Ch. 38, §33A-1) is a Class 4 felony with a minimum term of one year.

Thus, the crimes which permanently bar one from licensure are less, or at least no more, serious than many others which do not. Furthermore, they appear on their face less job related than many crimes, including those discussed above, which are not a bar. As a group, the five excluded crimes (or groups of crimes) have only one thing in common; they represent one group's arbitrary and under- and over-inclusive definition of morally offensive acts. Illegal and deviant sex, narcotics and deadly weapons is an uncomfortable triumvirate. While incest is a criminal act, its commission bears no conceivable relationship to the ability to perform as a public chauffeur. The ordinance independently bans the licensure of narcotics addicts and, as has been demonstrated, the weapons provision has too many variations to allow it to be described, without further definition, as the most serious of offenses. Rather, setting this group of five crimes apart and condemning those convicted of them for life, harkens back to a time when the purpose of ex-offender disabilities was to hold persons out for public scorn and ridicule.

But even this medieval stigmatization is carried out irrationally, given the fact that it is not imposed on licensees. As the Court of Appeals necessarily concluded:

Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. *In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is per se likely to increase a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings.* App., at 21. (Emphasis added).

The conclusion of unreasonableness is buttressed by an examination of the jobs actually regulated by the public chauffeur's ordinance.

The commissioner has argued this case as if the public chauffeur's ordinance applied only to taxi-cab drivers. (Petitioner's Brief, at 7). It does not. Chapter 28.1-3 also licenses transit drivers who sit in a public forum, and ambulance drivers who work as part of a crew. It strains credibility to suggest that either pose a threat to the safety of their riders (unless the licensee is a poor driver). Assuming, as we must, that Miller and others are purportedly barred from licensure because of the potential threat they pose to the public<sup>33</sup>, the ordinance's harsh bar is not related to qualification for at least some of the jobs it regulates.

As to taxi drivers, the professed justification for the ex-offender ban—public safety—while a legitimate concern of the licensing authority, sounds far more substantial than reality requires. A review of similar ordinances in 18 of the largest cities in the United States discloses no other ex-offender ban remotely comparable in its severity to the one here.<sup>34</sup> None of the ordinances imposes a lifetime ban. Eleven

<sup>33</sup> The Commissioner has never argued otherwise, and in any event, it would be unconstitutional for him to deny Miller a license in order to punish him after he has already been punished once by the State of Illinois for a crime against the state. *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>34</sup> ATLANTA, GA., Code §34-4; BALTIMORE, MD., Code of Maryland Art. 78, §50H; BOSTON, MASS., City of Boston Police Department Rules and Regulations for Hackney Carriages; CINCINNATI, OHIO, no regulation; CLEVELAND, OHIO, no regulation; DALLAS, TEX., Dallas Code §45-3.2; DENVER, COLO., Municipal Code of the City and County of Denver, Taxicabs §8; DETROIT, MICH., Detroit Municipal Code §60-2-19; HOUSTON, TEX., Code §45-63; LOS ANGELES, CAL., no regulation; MIAMI, FLA., Code of the City of Miami §56-129; MILWAUKEE, WIS., Milwaukee Code, Ordinance No. 295, §100-65; MINNEAPOLIS, MINN., Minneapolis Code §341 360(g); NEW YORK, N.Y., Local Laws of the City of New York 1971, No. 12, Ch. 65 §2305(b),(g); SAN DIEGO, CAL., San Diego County Taxicab Ordinance §21.312; ST. LOUIS, MO., Revised Code of St. Louis §306.060; SAN FRANCISCO, CAL., Code §11; SEATTLE, WASH., Code Ch. 10.67 §020.

of the cities impose a specific time limitation upon hiring ex-felons, typically three to five years from conviction.<sup>35</sup> The remaining seven cities on the list have either no regulations or impose a good character requirement, which allows the licensing authority to consider a criminal conviction. Chicago's provision barring certain ex-offenders from licensure for life is, within the context of other major cities, disproportionately and irrationally severe.

Indeed, the fishbowl atmosphere of a taxi-cab, where every licensee in Chicago must post his "license and photograph as an exhibit for view by passengers," Ch.28.1-7, Municipal Code

<sup>35</sup> E.g., Milwaukee Ordinance No. 295:

Part 11. Section 100-65 of the Code is hereby created to read:  
100-65. Taxicab Driver's License.

## (2) QUALIFICATIONS AND APPLICATION.

Each applicant for a driver's license must:

- (a) Be of the age of not less than 18 years.
- (b) Possess a valid state of Wisconsin motor vehicle driver's license.
- (c) Be able to read and write the English language.
- (d) Be clean in dress and person.
- (e) Have police record checked and not have been convicted of any of the following offenses within the last five (5) years:
  1. Manslaughter or negligent homicide resulting from the operation of a motor vehicle.
  2. Driving a motor vehicle while under the influence of intoxicating liquor or drugs.
  3. Any felony in which physical violence is used.
  4. Any crime against sexual morality as specified in Chapter 944 of the Wisconsin Statutes.
  5. Six (6) or more offenses relating to intoxications.
  6. Two (2) or more offenses relating to dangerous drugs.

of Chicago, suggests that crimes by drivers against passengers are unlikely.<sup>36</sup>

In addition, a licensee is not even guaranteed a job as a public chauffeur. After licensure, he must be hired by a private company, which may independently refuse to hire him for reasons which might include his criminal record.

The ordinance at issue here is the harshest and most restrictive in the City of Chicago, further buttressing the Seventh Circuit Court of Appeals' conclusion that the reasonableness of the classification itself has been undercut. All but one other<sup>37</sup> of the myriad of licenses is governed by the general character and fitness requirements of Ch.101-5 of the Municipal Code. This provision, which does not prohibit the licensure of ex-offender applicants (but presumably allows the licensing authority to consider a conviction), governs numerous sensitive positions.<sup>38</sup> While the ordi-

<sup>36</sup> Ch.28.1 *et seq.* also prohibits chauffeurs from carrying weapons (Ch.28.1-13); requires finger-printing of applicants (Ch.28.1-4); allows for discretionary renewal of the license each year (Ch. 28.1-9), and provides for fines, suspension or revocation (Ch. 28.1-10 and Ch.28.1-15). In addition Chapter 28, governing cab companies, requires that the cab contain identifying marks (Ch. 28-10), a separate card for the driver (Ch.28-11), and every cab to have four doors (Ch.28-4.1).

<sup>37</sup> A person may not operate a security firm if he has been convicted of a felony within the last ten years. Municipal Code of Chicago, Ch. 117.

<sup>38</sup> E.g., Auto repair shops (Ch.156-1 *et seq.*); Billiard or Pool Rooms (Ch. 104.1-1 *et seq.*); Explosives, Handling of (Ch.125-1 *et seq.*); Housemovers (Ch.138-1 *et seq.*); Itinerant Merchants (Ch. 168-11 *et seq.*); Policemen (special) (Ch.173-1 *et seq.*); Rifle ranges (Ch.170-1 *et seq.*). Other sensitive jobs are regulated but not licensed, such as nurses' aides or orderlies (Ch.136.2-31), while many—such as building inspectors (Ch.41), the defendant commissioner (Ch.21.1), or the Mayor of the City of Chicago—are entirely unregulated.

nance governing public chauffeurs was passed in 1951, the general provisions of Ch.101-5 were enacted by the Chicago City Council in 1972. A short time prior to that date the State of Illinois amended all its licensing provisions to provide that in determining moral character the licensing agency may take into consideration any felony conviction of the applicant, "but such conviction shall not operate as a bar to examination for registration."<sup>39</sup> Thus, it appears that the City of Chicago was following the enlightened lead of the State of Illinois when it enacted Ch.101-5.<sup>40</sup> By contrast, the public chauffeur's ordinance stands out like an anachro-

<sup>39</sup> See e.g., Ill.Rev.Stat. 1975, Ch.10-1/2, §5 (architects).

<sup>40</sup> In a written statement from then-Mayor Daley, February 2, 1972, and reprinted as part of the Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 2nd Sess., January 29, 1972, and entitled *Illinois: The Problems of the Ex-Offender*, Daley rejected the philosophy of Ch.28.1-3, presaging the passage of Ch.101-5. He wrote:

Chicago has recently undertaken what I believe is a significant new project in the field of offender rehabilitation. Supported by funding from the Law Enforcement Assistance Administration, the Chicago Civil Service Commission, with the support and counsel of the Mayor's Office of Manpower, is establishing a parolee employment program. As you know, most men leave our various penal institutions with only the means to maintain themselves for a short period of time. In addition, present employment practices tend to freeze a parolee out of the labor market. Few firms are willing to hire the ex-convict in any capacity. With its parolee employment program, the City of Chicago hopes to alter significantly the above conditions. The City will hire 100 ex-convicts—both men and women—who will work on a wide variety of jobs, e.g., truck driver, forestry laborer, counselor, or secretary. Support will not be restricted to employment alone. The City will also provide counselors and coaches . . . [and] fringe benefits. . . . [A] participant may enroll in a college or vocational program while he is working.

Perhaps even more significant than the employment and support services themselves is the fact that the City is setting a trend which industry will hopefully follow. Doors previously barred to ex-convicts may open as a result of the policy set by the City of Chicago. *Id.* at 124.

nistic sore thumb: former armed robbers may operate security firms (after 10 years), handle explosives, operate rifle ranges, and be special policemen. But they can not apply to be cab drivers. See notes 37, 38, *supra*.

Chapter 28.1-3 of the public chauffeur's ordinance is a vestige of an archaic mode of thought which unconstitutionally deprives Luther Miller of the equal protection of the laws. The ordinance fails to provide for a sufficiently focused inquiry into Miller's present fitness for licensure, *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), even while it provides such an inquiry for other similarly situated persons. The denial, for life, of an individualized determination of fitness for Miller is a denial of process, an exclusion from consideration, which is wholly disproportionate to any real differences which may exist between persons like Miller and others. *James v. Strange*, 407 U.S. 128 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966). The ordinance is therefore arbitrarily over- and under-inclusive. *Jimenez v. Weinberger*, 417 U.S. 628 (1974). As in *James v. Strange*, *supra*, the provisions of the ordinance embody "elements of punitiveness and discrimination." 407 U.S. at 142. They so exceed the accepted requirements of common non-professional occupations as to make them irrational. *Sugarman v. Dougall*, 413 U.S. 634 (1973). In sum, Mr. Miller's qualifications are to be forever ignored for irrational and discriminatory reasons while others not obviously more or less fit are allowed an opportunity to establish their present fitness for licensure.

#### B. The Commissioner's Defense of the Ordinance Further Demonstrates Its Irrationality.

The reasons offered by the Commissioner to support the classifications created by the ordinance actually help demonstrate its irrationality. The decisions he relies upon are either irrelevant or entirely consistent with Miller's position that the ordinance is unconstitutional.

The Commissioner has chosen to defend only the narrow distinction between applicants who committed a disabling offense years before and licensees who have just done the same. The former may never be licensed, whereas the latter may retain their license at the discretion of the Commissioner and then the mayor. By limiting his defense to this classification, the Commissioner thereby ignores all of the other irrational classifications which are created by the ordinance.

The Commissioner presents just two arguments as purported justification for the differing treatment of applicants and licensees guilty of the same offense. First, he argues that "licensees in the course of their employment establish a record by which their fitness can be judged." (Petitioner's Brief, at 13). Second, he asserts that the licensee's interest in retaining his license (and thus his job) is sufficiently strong to justify the grant of discretion.<sup>41</sup>

The "track record" argument was addressed and properly rejected by the Court of Appeals.

The city's purported justification for this different treatment of persons who commit one of the listed offenses after receiving a license is that they have a "track record" that the commissioner and mayor can balance against the felony in evaluating fitness. The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. Indeed, one

<sup>41</sup> The due process argument shown up by the Commissioner is discussed below. See n.44, *infra*.

who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would according to the ordinance, also be eligible to retain the license, for under Ch.28.1-10 misrepresentation or omission of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation. App., at 20-21.

While the Court of Appeals effectively undercut the track record argument, there are several additional bases for finding both of the Commissioner's arguments inappropriate. First, he ignores the fact that licensees may have no track record or present real interest in a job at all. A license only allows one to apply for private employment as a public chauffeur. Thus, a licensee may hold his license for weeks, months, or even years without ever actually driving a taxi-cab. Similarly, the licensee might be employed for a time as a public chauffeur and then cease that work, while maintaining a current license. In both cases, the licensee's most recent track record will have been made in employment unrelated to being a public chauffeur.<sup>42</sup> In short, such a person's track record is indistinguishable from Luther Miller's and his interest in the license is no more substantial.

Second, even if the convicted licensee has been employed as a public chauffeur, the assumption behind the ex-offender applicant total disability makes one's actual record as a public chauffeur no more relevant than other employment experience, or for that matter, the absence of recent criminal activity. If there is logic behind the ordi-

<sup>42</sup> On the other hand, a license applicant with a disabling criminal offense may come to Chicago, having driven a taxi-cab after his conviction somewhere else for many years. This is a possibility, since almost all major cities do not have a disability like Chicago's. See notes 34-35, *supra*.

nance's assumption that Mr. Miller and others like him are forever unfit, it would purport to be based on an assumption that a person who has committed a certain criminal offense is likely to commit further criminal acts. In the case of one already licensed, a conviction for an otherwise disabling offense should establish that the licensee has recently evidenced character traits that may pose a danger to the public. When the Commissioner evaluates this new fact, the Commissioner has only pre-conviction information from the licensee to examine. On the other hand, the applicant's record includes post-conviction information, which may include a record of both steady employment and crime-free behavior for many years.

Moreover, the track record argument is also totally unresponsive to the concerns expressed in *Roth v. Daley*, *supra*, that the ordinance is irrational due to making only some crimes, less serious than others, a bar to eligibility. And finally, the track record argument does not explain the ordinance's failure to bar serious vehicle-related offenses.

Respondent does not dispute that the licensed and employed public chauffeur often has a stronger interest in retaining his license than an applicant has in obtaining a license for the first time. So did the citizen at liberty upon the public streets in *Baxstrom v. Herold*, 383 U.S. 107 (1966), often have a stronger interest against subjection to the deprivation of his liberty due to involuntary civil commitment than did the criminal convict who was just completing a prison term. The free citizen was indisputably threatened with job loss, family disruption, and the unfamiliar experience of incarceration in a public institution, whereas the already imprisoned convict would seldom suffer any of these harms. Nevertheless, the Court found that the degree of difference between the two would not support

the *extent* or the *kind* of different treatment that New York visited upon them. And so it is here. The *degree* of difference between an applicant like Miller and an employed licensee simply pales to insignificance in light of the differing treatment accorded the two, given the alleged purpose of the ordinance. Miller may never be considered for licensure, however old his crime or good his character, whereas the licensee's recent crime may be overlooked if his character appears good, on the basis of an immediate and individualized inquiry into fitness.<sup>43</sup> It is the *extent* of this disparity—its disproportionality given an indisputable, but far less significant, difference in the situations of the classes of persons who are treated so drastically differently—that is invidiously *discriminatory*. Cf., *James v. Strange*, 407 U.S. 128 (1972).

Moreover, the *kind* of differing treatment accorded to licensees and to applicants is unrelated to, as well as incommensurate with, the differences in their situations. The differing circumstances might support a differing allocation of the burden of proof of fitness, or a different weighing of elements in the process of evaluating fitness, within a scheme that did evaluate the individual fitness of both licensees and applicants. They will not support an evaluation of the fitness of the one, but a refusal to evaluate the fitness of the other. The Chicago ordinance recognizes the importance of treating the licensee as an individual human being for the purpose of focused inquiry into his actual, personal fitness to do his job. It treats the applicant not as a differently situated person but as an absolute non-person, whose fitness (as well as whose interest in being employed

<sup>43</sup> Mr. Miller has no objection, of course, to the City of Chicago's giving a licensee the opportunity to retain his license, instead of revoking it by a *per se* rule. Nothing in his submission would forbid the City to continue this practice.

as a public chauffeur) is not to be considered at all. Within the class of licensees, some will undoubtedly have a greater interest in retaining their licenses than others. Individual applicants will also differ from each other in the degree of their interest in having a license; and the interest of some will be greater than the interest of some licensees. Here again, the actual, individual interest of each licensee may be considered; but that of the applicant may not. The Court of Appeals was plainly correct in describing these differing treatments as irrational.<sup>44</sup>

<sup>44</sup> Throughout his brief, the Commissioner purports to discuss the due process rights of licensees as opposed to applicants. Relying principally on *Board of Regents v. Roth*, 408 U.S. 564 (1972), he argues that the former have rights to a hearing whereas the latter do not. He characterizes the ordinance in similar terms: "[T]he line drawn by the ordinance is not between those eligible for the license and those not eligible but rather between those entitled to a hearing and those denied a hearing." Petitioner's Brief, at 15. This legal and factual characterization is simply wrong. Every applicant is entitled to a hearing pursuant to the Code, Ch.101-5 (text at n.27, *supra*), a fact which Commissioner Carter himself argued in *Freitag v. Carter*, 489 F.2d 1377, 1382 (7th Cir. 1973). There is therefore no procedural due process issue before this Court. The distinction between Miller and all other persons, applicants or licensees, is that regardless of what evidence he presents at the hearing, he is forever barred from licensure by the operation of a *per se* rule, without regard to actual fitness, whereas everyone else sooner or later is eligible and thereafter receives an individualized determination of fitness. In short, the fact Mr. Miller attacks here is his ineligibility for licensure. A statute which allows one group to make a showing under a given standard but applies a different standard to the second group, while giving both a "hearing," obviously raises equal protection questions. Cf., *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Califano v. Goldfarb*, 97 S.Ct. 1021 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975). All Social Security applicants can get a hearing; the problem in these cases was whether the standard applied to the applications and/or in hearings violated equal protection.

In the face of the irrational results which follow from the terms of the ordinance, the Commissioner now asks this Court to "suppose" that they will not occur because he will not really protect licensees. Petitioner's Brief, at 15-16. Nothing in the record supports making suppositions about how the licensing authority will act or his protestations that he will ignore the thrust of the ordinance.

In support of the arbitrary life-long bar, the Commissioner relies upon *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), which upheld a Massachusetts statute requiring all state police who reach 50 years old to retire from active duty. All parties in *Murgia* agreed that there existed objective evidence (increased risk of cardio-vascular failure) to support the retirement rule. The Court also found that in order to individually evaluate a policeman's continued physical fitness, the state would have been required to conduct a "number of detailed studies." 427 U.S. at 311. In contrast, no objective evidence exists here. To the contrary, the Commissioner admits the decision to impose a life-time exclusion was "arbitrary." Petitioner's Brief, at 26. Furthermore, no additional detailed studies to determine fitness need be conducted by the Commissioner. There is a pre-existing evaluative mechanism. See pp. 52-54, *infra*. Thus, while it may in fact be difficult to "reliably [predict] the rehabilitation of convicted armed felons [sic]," Petitioner's Brief, at 20, the Commissioner already does just that for other offenders.

Actually, a person in Miller's position may be easier to evaluate than other applicants, offenders and non-offenders alike. Luther Miller was convicted twelve years ago, when 20 years old. He has been out of prison for five years. Other applicants could have been released 10 or 20 years ago. Thus Mr. Miller and others like him have established

extensive post-release records in the community, records which may provide far more substantial bases on which to determine character and fitness than the information collected about many other applicants. Since the Commissioner evaluates the character and fitness of all other applicants and licensees, including most ex-offenders, the Commissioner cannot now be heard to say that because the character and fitness of a few ex-offenders is hard to evaluate, he may decide to exclude only them.<sup>48</sup>

Also distinguishing *Murgia* is the fact that the "discrimination" there was very different from that embodied in this Chicago ordinance. In *Murgia* the burden of the statute was applied to all policemen when they became 50. It was merely a condition of continued public employment for a few, select, physically demanding jobs. Nor was the law directed against a vulnerable few. The class injured in *Murgia* was one "each of us will reach if we live out our normal span," 427 U.S. at 313-314, a happening all of us hope will occur. Moreover, as a body politic, we have sought to remove the vestiges of age discrimination from our society, see e.g. Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*; Age Discrimination Act of 1975, 42 U.S.C. §6101 *et seq.*, while making the class of elder citizens the beneficiary of numerous social welfare programs. In contrast, the ordinance here applies to a select indiscriminately chosen few who are denied the opportunity, not to obtain a public job, *Board of Regents v. Roth*, 408 U.S. 564, 574 (1972), but to enter the work force. Second, the law disadvantaging Miller is juxtaposed, not with a general societal commitment to avoid discrimina-

<sup>48</sup> Not only does the State of Illinois presumptively consider the rehabilitation of all ex-offenders in license applications (see page 38, *supra*), but some statutory provisions explicitly demand consideration of their rehabilitation. E.g., Ill.Rev.Stat., Ch. 41, §72h-9 (1975) (Dentists).

tion against the class of ex-offenders to which Miller belongs, but with a pattern of irrational discrimination directed against a discrete and insular minority.

The Commissioner also looks to *DeVeau v. Braisted*, 363 U.S. 144 (1960), but it is difficult to visualize a law conceived with greater focus into fitness than the one in *DeVeau*, which prohibited ex-felons from becoming officers of a waterfront union.<sup>49</sup> The Court found that there was a direct relationship between the law's prohibition and its purpose—removing corruption from the waterfront. Senate investigations studying waterfront conditions had established that:

... gambling, the narcotics traffic, loansharking, short-ganging, payroll 'phantoms,' the 'shakedown' in all its forms—and the brutal ultimate of murder—have flourished, often virtually unchecked [in the unions]. 363 U.S. at 158.

The investigations further found that these same unions were controlled by criminals with long records, and that:

... No positions on the waterfront were more conducive to its criminal past than those of union officials, and none, if left unregulated, were felt to be more able to impede the waterfront's reform. 363 U.S. at 158.

The law was sustained in *DeVeau*, but only in view of the investigations which substantiated the need for the legislation:

New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contrib-

<sup>49</sup> The exclusion contained in the law was not as all-encompassing as here, since the bar would be removed in the event of "a favorable exercise of executive discretion." 363 U.S. at 159.

uting factor to the corrupt waterfront situation.<sup>47</sup> 363 U.S. at 159, 160.

By way of contrast, the Commissioner has never come forward with any showing establishing the need for his more repressive rule. Instead he mildly concedes the City Council's "somewhat arbitrary decision." Petitioner's Brief, at 26. *DeVeau* sanctioned barring ex-felons from holding office in unions rife with corruption; Luther Miller merely wishes to demonstrate his fitness to be a public chauffeur.<sup>48</sup>

The Commissioner's reliance upon *Marshall v. United States*, 414 U.S. 417 (1974) and *Dixon v. Love*, 97 S.Ct. 1723 (1977), is similarly inapposite. The *Marshall* Court refused to order the government to spend monies from the treasury to place three-time drug offenders (as opposed to two-time offenders) in rehabilitation programs. It is therefore consistent with *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Dandridge v. Williams*, 397 U.S. 471 (1970), and other decisions

<sup>47</sup> In *Pordum v. Board of Regents of State of New York*, 491 F.2d 1281 (2nd Cir. 1974), the Second Circuit reconciled *Schwartz* and *DeVeau* as follows:

Where no . . . legislative finding is present, exclusion from a profession can be justified only after a detailed and particularized consideration of the relationship between the person involved and the purpose of the exclusion. 491 F.2d at 1287 n.14.

<sup>48</sup> Although not discussed by the Commissioner, *Hawker v. New York*, 170 U.S. 189 (1898), and *Barsky v. Board of Regents*, 347 U.S. 442 (1954), are consistent with *DeVeau* and the requirements of *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). Both involve professionals, justifying higher demands for licensure. Hawker's conviction was for performing an illegal abortion, obviously directly related to his fitness to remain a doctor. Barsky, also a doctor, had his license suspended for a non-medical reason, see Frankfurter, J., dissenting, 347 U.S. at 470, but the suspension was only for six months, and followed a finding of criminal contempt. See also *Dent v. State of West Virginia*, 129 U.S. 114 (1889).

which have refused to require the expenditure of additional public funds on persons outside of the benefited class. *Marshall* is further distinguishable because the persons excluded from that program were multiple offenders with at least one presently outstanding conviction and all of the uncertainties of future rehabilitation, rather than, as in the case of Luther Miller, a person with one ancient conviction, seeking the right to demonstrate a record of post-conviction responsible citizenship.

*Dixon v. Love*, 97 S.Ct. 1723 (1977), not only required individualized determinations—"[t]he only question is one of timing," 97 S.Ct. at 1727—but the disability imposed was the result of a sufficiently focused inquiry into fitness. The correlation between three driver's license suspensions (nine convictions for violating the Motor Vehicle Code) and fitness to drive an automobile is patent. Moreover, the rule in *Dixon* was sanctioned as one promoting fairness in the system:

The decision to use objective rules in this case provides drivers with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers. 97 S.Ct. at 1729.

In contrast, it is not the ordinance at issue here, but the Illinois Criminal Code which puts citizens on notice as to what constitutes acceptable behavior. It is the clear penalties of the criminal code which promote fairness and equality of application. The ordinance, on the other hand, sanctions unfairness by licensing some but not others similarly situated, and ultimately by refusing to grant persons who long ago "paid their debt to society" the right to ever establish their own good character and fitness.

In summary, the underlying premise of the Commissioner's argument is that since courts traditionally have shown deference to legislative line drawing, this ordinance must be

constitutional. But that argument ignores or tries to paper over the irrationality of the classifications created by the ordinance, as well as decisions invalidating similar schemes. It ignores decisions of this Court which demand a more focused inquiry into the fitness of license applicants than is provided by this ordinance. It further relies upon decisions which, upon analysis, support the conclusion that Ch.28.1-3 is unconstitutional. The public chauffeur's ordinance denies Luther Miller the equal protection of the laws by its provision forever prohibiting his licensure.

### III. The Categorical Exclusion Of Certain Ex-Offenders From Licensure Based On An Irrebuttable Presumption Of Unfitness Violates The Due Process Clause Of The Fourteenth Amendment.

That portion of Chapter 28.1-3 which is here being challenged simply bans from licensure for life any applicant who has ever been convicted of certain crimes. In so doing, the ordinance embodies in law the irrebuttable presumption, both conclusive and permanent, based on past acts, that such persons are unfit to secure public chauffeur licenses to drive cabs, ambulances or buses. It leaves no room for consideration of the age of the person when the crime was committed, rehabilitation since the commission of the crime, the nature of the crime, the time elapsed since the crime occurred, evidence of changes in the person's character, the person's efforts at improvement, the person's attitudes regarding his past error, or any other relevant information which might suggest that the applicant is a safe licensee. In short, the ordinance is unconstitutional for reasons substantially similar to those relied upon in *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); and *Stanley v. Illinois*, 405 U.S. 645 (1972)—it denies the applicant the right to present evidence

as to his present fitness for a license. Moreover, it denies that right for life. In lieu of an opportunity for individualized assessment offered to all others, the categorical exclusion operates as an absolute and permanent presumption of unfitness, immutable and inflexible.

The presumption of unfitness embodied in the public chauffeur's ordinance is similar in many respects to the law struck down in *Stanley v. Illinois*, 405 U.S. 645 (1972). *Stanley* declared unconstitutional an Illinois law providing that unwed fathers were conclusively presumed to be unfit parents. The Court reasoned:

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. 405 U.S. at 654-5.

Similarly, here it may be that some ex-offenders are not fit to be licensed as public chauffeurs. It is clear, however, that some, including Miller, may be fit licensees. Nonetheless, the law prohibits their licensure, presuming instead their immutable unfitness.<sup>49</sup>

The State defended the law in *Stanley* as based on administrative convenience. 405 U.S. at 656. Recognizing the State's valid interest in protecting the child, this Court said:

<sup>49</sup> Frankfurter, J., concurring in *Schwartz v. Board of Bar Examiners*, *supra*, at 251, presaged the analysis contained herein, when he stated:

But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who entertained them (and joined the Communist Party) and who later undoubtedly came to their senses and their sense of responsibility "questionable characters."

We are not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve those ends are constitutionally defensible. 405 U.S. at 652.

The lifetime bar to licensure of certain ex-offenders is not justified as an end in itself here, either. The Commissioner writes that the "somewhat arbitrary" ordinance, Petitioner's Brief, at 26, is justified because of the difficulties inherent in evaluating rehabilitation in order to establish fitness. Petitioner's Brief, at 20. Thus, as in *Stanley*, the issue before this Court is the means chosen by the City of Chicago, not its ultimate goal of protecting the public safety.

In this case, the means chosen by the city are both conclusive and lifelong. At the same time, the Commissioner does have a comprehensive system for evaluating the present fitness for licensure of all other ex-offenders, an evaluative process which weighs and analyzes the applicants' and licensees' employment histories, character references, reputations, and abilities to perform as public chauffeurs prior to issuing or denying or terminating a license.

This Court has been particularly careful in scrutinizing exclusions in situations where the government has such a pre-existing, broadly applied evaluative mechanism which is already measuring or focusing on the same factors which theoretically underpin the exclusionary bar. Thus, in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Social Security Administration already was measuring dependence for illegitimate children born before the father's disability. It was irrational to exclude the limited group of after-born illegitimate children from this pre-existing, broadly applied evaluative scheme already measuring dependence and the validity of the claimed paternity. See also *Baxstrom v. Herold*, 383 U.S. 107 (1966) (prisoners excluded from pre-existing, broadly applied, commitment mechanism); *United*

*States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

These cases are in contrast to those where there was no pre-existing mechanism which focused on the same factors underpinning the absolute barrier to entitlement. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Social Security Administration was not already 'in the business' of evaluating the validity of marriages—"the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage. . . ." 422 U.S. at 772.<sup>50</sup> Similarly, in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), the state had no pre-existing mechanism to determine whether particular opticians had the ability to prescribe lenses. See also *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). In such situations, the government, seeking to avoid the need to establish complete new systems to evaluate eligibility or fitness, properly drew straight lines to establish the result.

Here, the City of Chicago has itself chosen to establish elaborate systems to evaluate the eligibility or fitness of most applicants, including consideration of past conduct.

<sup>50</sup> *Weinberger v. Salfi*, 422 U.S. 749 (1975), sustained a challenge to a Social Security provision which presumed that all marriages entered into less than nine months prior to the death of a beneficiary were fraudulently conceived. The decision in *Salfi* is premised upon the administrative needs of a massive social welfare agency. Thus, the Court found that the prophylactic rule: (1) saved agency resources, and (2) protected other potential recipients, who satisfied the rule, from the "uncertainties and delays of administrative inquiry into the circumstances of their marriage", 422 U.S. at 782; that (3) it would be difficult to determine if a marriage was in fact a sham; and (4) granting exceptions to the rule might well encourage the evil sought to be avoided. 422 U.S. at 782-3.

When, at the same time, Miller and other applicants are absolutely excluded from the evaluative mechanism, even though their evaluation would be based on the same type of criteria applied to all others, the system should be carefully scrutinized.

The ordinance here cannot withstand the scrutiny properly applied to such irrebuttable presumptions of unfitness. The rule barring Miller's licensure is not narrowly drawn. *Cleveland Board of Education v. LaFleur*, 414 U.S. at 632, 647 n.13 (1974). The lifetime prohibition could not be broader. Nor would an individualized evaluation of Miller burden the public treasury; not only does the Commissioner evaluate all other ex-offenders, but he is authorized to, and does, charge a license fee to cover those costs. *Gibbons v. City of Chicago*, 34 Ill.2d 102, 214 N.E.2d 740 (1966). In sum, adequate alternative means, *Vlandis v. Kline*, 412 U.S. 441, 451 (1973), exist to avoid the irrebuttable life-time presumption of unfitness imposed upon Miller.<sup>51</sup>

The impropriety of a bar which is both conclusive and permanent is heightened where it is imposed by the government as a barrier to access to a large field of private employment. This Court has long recognized that employment, and particularly the right to engage in the common occupations of life, is a basic human liberty. *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinder-*

<sup>51</sup> Judge Campbell, in his concurring opinion, addressed this issue, concluding that: "[T]he hearing procedure . . . offers a reasonable and practical means of establishing the pertinent facts on which the City's objective is premised." App., at 44.

*mann*, 408 U.S. 593 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Truax v. Raich*, 239 U.S. 33 (1915); *Smith v. Texas*, 233 U.S. 630 (1914). For that reason, the Court has carefully scrutinized absolute barriers erected to prohibit a small group of persons' entry into the employment market. Thus *Schware, supra*, insisted that qualification for licensure follow a focused inquiry into an applicant's present fitness for licensure. Similarly, *Sugarman, supra*, which considered "whether New York's flat statutory prohibition against the employment of aliens in the competitive civil service is constitutionally valid," 413 U.S. at 639, while specifically reserving for the state the right to hire or fire any person for "whatever legitimate reason," *Id.*, concluded that the "breadth and imprecision" of the law violated the Constitution. *Id.*

Four Courts of Appeals have followed this Court's lead and disapproved of irrebuttable presumptions of unfitness which operate to preclude entry into, or retention in, employment. *Gurmankin v. Constanzo*, Nos. 76-1730, 76-2297, and 77-1273 (3rd Cir. April 25, 1977); *Berger v. Board of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975); *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976); *Crawford v. Cushman*, 531 F.2d 1114 (2nd Cir. 1976); *Pordum v. Board of Regents of the State of New York*, 491 F.2d 1281 (2nd Cir. 1974). Thus, in *Gurmankin*, a blind prospective teacher challenged a rule prohibiting her from taking a qualifying examination because blind teachers were not permitted to teach sighted students. Relying upon *Cleveland Board of Edu-*

*cation v. LaFleur*, 414 U.S. 632 (1974), the Third Circuit Court of Appeals held the rule unconstitutionally deprived Gurmankin of the opportunity to present evidence of her competency.

The refusal by the District to permit her to take the examination violated due process by subjecting Ms. Gurmankin to an irrebuttable presumption that her blindness made her incompetent to teach sighted students.

Similarly in *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976), the Fifth Circuit Court of Appeals declared unconstitutional a school district rule prohibiting the employment of parents of illegitimate children. The school district defended its rule by insisting that unwed parenthood is *prima facie* proof of immorality. In order to evaluate this claim of unfitness, the court adopted the principles established in *LaFleur*, *Vlandis*, and *Stanley*:

The law is clear that due process interdicts the adoption by a state of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact. Thus, unless the presumed fact here, present immorality, necessarily follows from the proven fact, unwed parenthood, the conclusiveness inherent in the . . . rule must be held to violate due process.<sup>52</sup> 507 F.2d at 614-15.

<sup>52</sup> The court noted that "if a state investigates the moral character of an individual upon whom it intends to either bestow a benefit or impose a burden, due process requires that such inquiry look to *present* moral character," (original emphasis), citing *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). 507 F.2d at 614n.6.

Finding that "the rule leaves no consideration for the multitudinous circumstances under which illegitimate child-birth may occur and which may have little, if any, bearing on the parent's present moral worth," 507 F.2d at 615, the court held that the conclusive presumption therein violated due process.

The public chauffeur's ordinance, Ch.28.1-3, is based upon an irrebuttable presumption of unfitness. By forever precluding his licensure, it in effect presumes that Mr. Miller is forever unfit for licensure. It does so even though a regularly established procedure has been established by the Commissioner to evaluate the fitness of almost all other ex-offender applicants. Thus, and especially in light of the fact that the ordinance precludes Luther Miller from one of society's most important rights, the opportunity to work, Ch.28.1-3 violates Miller's rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.

**CONCLUSION**

For the reasons stated, Respondent respectfully requests that this Court affirm the judgment of the Court of Appeals below. Alternatively, should this Court not affirm the judgment, Respondent respectfully requests that this cause be vacated and remanded to the Court of Appeals to consider the issues herein in light of a decision of an Illinois Appellate Court invalidating the same provisions of the Municipal Code of Chicago addressed herein. Note 25, *supra*, and accompanying text.

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No. 76-1171

Supreme Court, U. S.  
FILED

NOV 21 1977

MICHAEL ROBAX, JR., CLERK

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1977

**JAMES Y. CARTER**, Public Vehicle License Commissioner  
of the City of Chicago,*Petitioner,*

vs.

**LUTHER MILLER**, on his own behalf and on behalf of all  
others similarly situated,*Respondent.*On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit**SUPPLEMENTAL BRIEF OF RESPONDENT****ROBERT MASUR  
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(312) 726-6180**PETITION FOR CERTIORARI FILED  
FEBRUARY 24, 1977****CERTIORARI GRANTED APRIL 18, 1977**

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1977

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**JAMES Y. CARTER**, Public Vehicle License Commissioner  
of the City of Chicago,

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others similarly situated,

*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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Respondent Luther Miller files this Supplemental Brief pursuant to Supreme Court Rule 41(5) in order to apprise, as soon as possible, the Court of *Smith v. Fussenich*, Civil No. B-74-472 (Three-Judge Court, D.Conn., November 8, 1977)<sup>1</sup>, holding unconstitutional a Connecticut statute absolutely prohibiting the licensure of ex-felons as security guards or private detectives.

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<sup>1</sup> A copy of the opinion is attached hereto in an Appendix.

Kenneth Smith's application for a license as a security guard was rejected by Connecticut authorities due solely to his felony conviction record. Connecticut General Statute § 29-156a(c) reads in pertinent part:

No person shall be approved for employment [with a licensed private detective or security guard agency] who has been convicted of a felony or any crime involving moral turpitude that would tend to question his honesty and integrity.<sup>2</sup>

As discussed below, the opinion holding the law unconstitutional tracks all of respondent's principal arguments in the instant case.<sup>3</sup>

The Court holds that the Connecticut statute is unconstitutionally overbroad for two separate and yet inter-related reasons. Accepting the legitimacy of the state's general goal of prohibiting "individuals of bad character from employment as private detectives and security guards" (Appendix, page 5), the court found, relying upon *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), that the means adopted by the state fail to satisfy the "rational basis test" of Equal Protection review. First, the statute insufficiently focused upon the individual fitness of applicants by failing to differentiate between types of felons and by imposing "an irrational distinction between those convicted of felonies and those convicted of misdemeanors." (Appendix, page 5) *Butts v. Nichols*, 381 F.S. 573 (S.D. Iowa 1974) (Respondent's Brief, pages 27-37). "Moreover", said the court,

[T]he statute's across-the-board disqualification fails to consider probable and realistic circumstances in a

<sup>2</sup> It was stipulated between the parties that the law barred the licensure of all felony offenders. (Appendix, page 12, fn. 5.)

<sup>3</sup> The concurrence of Judge Newman, while finding the constitutional arguments "substantial" (Appendix, page 18) finds adequate state grounds for the holding.

felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation. We believe it is fair to assume that many qualified ex-felons are being deprived of employment due to the broad sweep of the statute.<sup>4</sup>

Second, the Court found that the irrational overbreadth of the statute, "becomes most pronounced" when compared with the myriad of other Connecticut licensing provisions regulating more sensitive positions, provisions which prohibit the state from rejecting an applicant "solely because of a prior conviction of a crime."<sup>5</sup> (Respondent's Brief, pages 37-39.)

The ordinance presently before the Court suffers from the same defects identified in *Smith v. Fussenich*, *supra*. Its overbroad life-time ban, like the Connecticut statute, prohibits a sufficiently focused inquiry into Respondent Miller's fitness for licensure, while providing it for all others. Its impact upon Miller, as opposed to other similarly situated persons, is also wholly disproportionate to any real or imagined differences which may exist between them, especially in light of the licensure requirements of more sensitive positions. In sum, the well-reasoned approach of *Smith v. Fussenich*,

<sup>4</sup> The court found *DeVau v. Braisted*, 363 U.S. 144 (1960) inapplicable because of the specific and exhaustive legislative finding in *DeVau* that drastic measures were necessary to cure the "mortifying evidence" of corruption on the New York waterfront, findings not similarly present in Connecticut. The same rationale applies here. (See Respondent's Brief, pages 47-48.)

<sup>5</sup> The court further noted, without so holding, that the ordinance "may well" embody an unconstitutional irrebuttable presumption of unfitness which is neither necessarily or universally true. (Appendix, page 8). This argument is made by respondent herein (Respondent's Brief, pages 50-57).

*supra*, provides substantial support for Respondent's position and the analysis therein presents the framework for the proper disposition of this case.

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

KENNETH W. SMITH, et al,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL NO. B-74-472
	:	
CLEVELAND B. FUSSENICH,	:	
Commissioner of State Police,	:	
et al,	:	
	:	
Defendants.	:	

Before: TIMBERS, Circuit Judge, ZAMPANO and NEWMAN,  
District Judges

MEMORANDUM OF DECISION

ZAMPANO, District Judge:

This case, brought pursuant to the provisions of 42 U.S.C. § 1983, presents the issue of the constitutionality of § 29-156a(c) of the Connecticut General Statutes, which bars felony offenders from employment with licensed private detective and security guard agencies.<sup>1/</sup> The plaintiff and the class he represents<sup>2/</sup> argue that the statute is invalid both on equal protection and on due process grounds, and that the State cannot deny licensure to a felon unless there is an individualized determination after a hearing of the felon's fitness for the position. The State, on the other hand, contends that its per se rule of exclusion rationally furthers its legitimate interests and that, in any event, the State Board of Pardons does provide a forum for felons to qualify for registration as security guards, watchmen, or private detectives. Jurisdiction of these

issues is conferred by 28 U.S.C. §§ 1331, 1343(3) and (4), 2281, and 2284<sup>3/</sup>. Since the material facts are not in dispute, both parties move for summary judgment.

## I

Under Connecticut law, Conn. Gen. Stat. § 29-153 et seq., all private investigators and security guards must be licensed by and registered with the Public Safety Section of the Department of State Police (hereinafter "Department"). Currently there are 147 private investigation and security guard agencies in Connecticut, with over 9,000 employees. Private detectives gather evidence in civil and criminal matters, make background checks in employment cases, and perform general investigative functions. The duties of security guards include patrolling and guarding stores, shopping malls, schools, commercial buildings and industrial sites. In crowd control situations they act as uniformed deterrents. Neither the private investigators nor the security guards possess arrest powers. They may carry firearms only if they are authorized to do so by a special permit procedure which applies to all private citizens.

Under the registration scheme, there is an automatic disqualification of any applicant who has been convicted of a felony. In 1974 alone, there were 103 rejections for registration by the Department of persons who had prior felony records. However, a misdemeanor or a person who has a history of alcoholism or drug abuse may be eligible for licensure if the Department deems the applicant fit under relevant criteria such as the nature and extent of the criminal behavior, progress made through rehabilitative treat-

ment, and so forth. The record also discloses that licensure is not required by the Department with respect to numerous occupations in which services are rendered similar to those performed by private detectives and security guards. These include: (a) watchmen employed directly by retail establishments and factories, (b) security guards in buildings owned or leased by State or local governments; (c) investigators assigned to the Connecticut Department of Social Services; and (d) attorneys conducting civil or criminal investigations.

The named plaintiff in the instant case, Kenneth Smith, is a 26 year old white male who was accepted for employment by the Licensee Prudent Investigation Services of Bridgeport, Connecticut. When his application for a license as a security guard was rejected by the Department due to his felony conviction record, this action was instituted<sup>4/</sup>.

## II

The main issue before the Court is plaintiff's contention that the statute in question is violative of his rights under the Equal Protection Clause of the Fourteenth Amendment<sup>5/</sup>. In applying equal protection analysis, strict scrutiny of a legislative classification is required only when the statute operates to the particular disadvantage of a suspect class, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin), or when it impermissibly interferes with the exercise of a fundamental right, e.g., Kramer v. Union Free School District, 395 U.S. 621 (1969) (vote); Shapiro v.

Thompson, 394 U.S. 618 (1969) (travel).

Although the right to hold specific employment is a vital and constitutionally protected one, Willner v. Committee On Character, 373 U.S. 96, 102 (1963); Greene v. McElroy, 360 U.S. 474, 492 (1959), the Supreme Court has emphasized that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities." Dandridge v. Williams, 397 U.S. 471, 485 (1970); see also Massachusetts Bd. Of Retirement v. Murgia, 427 U.S. 307, 314 (1976). Thus, courts have refused to apply the "strict scrutiny" standard to classifications based on criminal record. Upshaw v. McNamara, 435 F.2d 1188, 1190 (1 Cir. 1970); Butts v. Nichols, 381 F. Supp. 573, 578-579 (S. D. Iowa 1974). This Court, therefore, will examine the constitutionality of Section 29-156a(c) in the light of the rational basis test.

The relevant inquiry under the rationality standard of review is "whether the challenged state action rationally furthers a legitimate state purpose or interest." San Antonio School District v. Rodriguez, 411 U.S. 1, 55 (1973); see also Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). In the particular context of occupational licensing, the Supreme Court has formulated a test which requires that "any qualification must have a rational connection with the applicant's fitness or capacity" to perform the job. Schwartz v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

### III

The defendants first contend that the statute's across-the-board disqualification of felons as security

guards and private detectives is rationally related to the legitimate interest of the State in preventing "the criminal element from a business that affects public welfare, morals and safety." In essence, the defendants argue there is an irrebuttable presumption that convicted felons cannot be relied on to exercise traits of honesty, fidelity, integrity and obedience to the law in the performance of their duties as guards and investigators.

For several reasons this justification is unacceptable. While we agree that the State may and should prohibit individuals of bad character from employment as private detectives and security guards, e.g., Lehon v. City of Atlanta, 242 U.S. 53 (1916); Norwood v. Ward, 46 F.2d 312 (S.D.N.Y. 1930) (three-judge court), aff'd mem., 283 U.S. 800 (1931), the validity of the goal of the statute is not under challenge in this lawsuit. Rather, we are asked to determine whether the method used to achieve that goal is constitutionally defensible. We hold that it is not.

The critical defect in the blanket exclusionary rule here is its overbreadth. The statute is simply not constitutionally tailored to promote the State's interest in eliminating corruption in certain designated occupations. The legislation fails to recognize the obvious differences in the fitness and character of those persons with felony records. Felony crimes such as bigamy and income tax evasion have virtually no relevance to an individual's performance as a private detective or security guard. In addition, the enactment makes an irrational distinction between those convicted of felonies and those convicted of misdemeanors.

Hence, a person is eligible for licensure even though he was convicted of a crime (larceny, false entry, inciting to riot and riot) which may demonstrate his lack of fitness merely because that crime is classified as a misdemeanor under the Connecticut code. Cf. Butts v. Nichols, supra at 580.

Moreover, the statute's across-the-board disqualification fails to consider probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation. We believe it is fair to assume that many qualified ex-felons are being deprived of employment due to the broad sweep of the statute. Finally, the irrationality of the enactment becomes most pronounced when it is compared with another Connecticut statute, Conn. Gen. Stat. § 4-610 which prohibits state agencies (other than law enforcement departments) from rejecting applications for licenses "solely because of a prior conviction of a crime." As a result, for example, there is no automatic exclusions of felons from the practice of law or medicine. These professions certainly have a greater attachment to the public welfare than the positions of private investigators and security guards which require little skill and responsibility.

In reaching our conclusion that the statute violates equal protection, we have not overlooked the decisions of the Supreme Court in DeVeau v. Braisted, 363 U.S. 144 (1960) and Hawker v. New York, 170 U.S. 189 (1898). In DeVeau, the Supreme Court upheld the absolute disqualification of

felons from office in waterfront labor organizations. However, in that case state and federal legislatures had uncovered "a notoriously serious situation [which needed] drastic reform" and had found "impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation." Ibid at 147, 159-160. In the instant case, the defendants have presented no evidence that prior to the passage of the statute the Connecticut legislature conducted an investigation which revealed that criminality was a serious problem in the regulated occupations or that felons as a class would undoubtedly corrupt these otherwise pure businesses.

Hawker is heavily relied on by the defendants in support of their argument that a violation of law may be accepted as conclusive evidence of bad character. While language in that case may lend weight to the defendants' position, the case is distinguishable on the ground that the critical issue under consideration there was whether a law forbidding felons from medical practice violated the ex post facto clause of the Constitution, Article I § 10, when applied to a doctor convicted before the statute was enacted. Moreover, as pointed out in Harrie v. Kentucky Board of Barbering, No. C-74-399L(A) at 6 (W. D. Ky. June 13, 1975), recent developments in the law indicate that Hawker "no longer has vitality."

#### IV

Since we find that § 29-156a(c) offends equal protection because it is insufficiently related to the articu-

lated purpose of the enactment, it is not necessary to consider plaintiff's further suggestion that the statute is invalid under due process. However, we deem it appropriate to mention that the statute's irrebuttable presumption may well be impermissible as a violation of the Due Process Clause of the Fourteenth Amendment. In Pordum v. Board of Regents of State of New York, 491 F.2d 1281 (2 Cir.), cert. denied, 419 U.S. 843 (1974), the Second Circuit ruled that a tenured teacher, who had been suspended from employment due to a felony conviction, was not entitled to continue teaching pending a hearing concerning his fitness. The Court of Appeals, in commenting on the claim that the sole function of the post-suspension hearing would be to show that Pordum had indeed been convicted of a crime, stated in part at 1287 n. 4:

If the hearing were to proceed in this manner, with the irrebuttable presumption that a person who has been convicted of committing a crime and who is on probation is unfit to teach in the public schools, it might raise serious constitutional difficulties.

Such irrebuttable presumptions are disfavored under the due process clause, Vlandis v. Kline, 412 U.S. 441, 446 [93 S.Ct. 2230, 37 L.Ed.2d 63] (1973), Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186, 4190-91 [414 U.S. 632 94 S.Ct. 791, 39 L.Ed.2d 52] (Jan. 21, 1974) and will be overturned if they are found to be neither "necessarily nor universally true." LaFleur, 42 U.S.L.W. at 4190. The Court, however, has upheld the use of a per se rule to exclude a class of persons from a certain occupation, but it did so in the context of a rule which was established after a comprehensive investigation into the relationship between the class of persons excluded (those convicted of felonies) and the evil sought to be avoided (corrupt prac-

tices by waterfront union officials). DeVeau v. Braisted, 363 U.S. 144 [80 S.Ct. 1146, 4 L.Ed.2d 1109] (1960). Where no such legislative finding is present, exclusion from a profession can be justified only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of exclusion. Schware v. Board of Bar Examiners, 353 U.S. 232 [77 S.Ct. 752, 1 L.Ed.2d 796] (1957).

See also, Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644 (1974); Stanley v. Illinois, 405 U.S. 645, 656-657 (1972); Crawford v. Cushman, 531 F.2d 1114 (2 Cir. 1976); Thompson v. Gallagher, 489 F.2d 443, 448 (5 Cir. 1973).

V

Finally, we consider the defendant's alternative contention that any constitutional infirmity apparent on the face of § 29-156a(c) is cured by the opportunity afforded a felon to obtain a pardon under the procedures set forth in Conn. Gen. Stat. §§ 18-26(c), 54-90 as amended by Public Acts 74-163 and 74-183 (1974).<sup>6/</sup> The argument is that, since the Department cannot disqualify an applicant for registration due to a felony conviction record which has been expunged through the pardoning process, the plaintiff and the members of his class do have available to them the individualized determination of fitness which they seek in this lawsuit. All they have to do is request a pardon under the applicable statutes. We find this argument unpersuasive.

There is nothing in the record before us, nor in matter of which we may properly take judicial notice, to indicate that the legislature intended the Board of Pardons to function in any capacity as a licensing authority. All relevant factors point to the conclusion that the Board

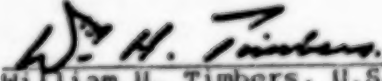
should not be considered to be part of a licensing process. Traditionally the discretionary power to pardon is a peculiar right of the executive branch of government, the exercise of which is not subject to judicial review. See, e.g., Beacham v. Braterman, 300 F. Supp. 182, 184 (S. D. Fla.) (three-judge court), aff'd 396 U.S. 12 (1969). No rules or regulations govern the Board's activities, nor are reasons advanced for its decisions.


Moreover, the plaintiff's class consists of all felons affected by § 29-156a(c), not just persons with felony convictions received in Connecticut. Because the Board has no power to grant pardons for federal or out-of-state offenses, it must be assumed that a significant part of the plaintiff's class would remain without a remedy if their only recourse was to the Connecticut Board of Pardons. Finally, we have no reason to infer either that the members of the Board possess greater expertise than the members of the Department in the determination of the fitness of a felon to be employed as a private detective or security guard, or that the administrative burden involved in such determination would be greater for the Department than the Board.

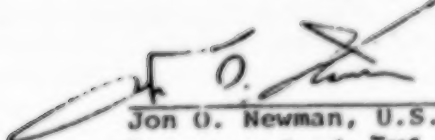
#### VI

Accordingly, the plaintiff's motion for summary judgment is granted; the defendants' motion for summary judgment is denied. Judgment shall enter declaring Conn. Gen. Stat. § 29-156a(c) unconstitutional and an injunction may issue, prohibiting its enforcement against plaintiff and the members of his class.<sup>7/</sup>

Dated at New Haven, Connecticut, this 31<sup>st</sup> of October, 1977.

  
William H. Timbers, U.S. Circuit Judge

  
Robert C. Zampano, U.S. District Judge

  
Jon O. Newman, U.S. District Judge  
*Concurred in the result with opinion*

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#### FOOTNOTES

1/ Conn. Gen. Stat. § 29-156a(c) reads in pertinent part: "No person shall be approved for employment [with a licensed private detective or security guard agency] who has been convicted of a felony or any crime involving moral turpitude that would tend to question his honesty and integrity. . . ."

2/ The Court grants plaintiff's motion to maintain this action on behalf of "all persons who have been or will be denied registration as employees of private detective or private guard agencies, or have or will be deterred from applying for such registration, due to the operation and enforcement of Conn. Gen. Stat. § 29-156a(c)." Fed. R. Civ. P. 23(b)(2) and (3).

3/ The plaintiff's motion to convene a three-judge court was granted on August 13, 1975.

4/ During the course of this litigation, Intervenor, Ronald Simes, who had been denied licensure based on a prior conviction, received a pardon on November 10, 1975. Subsequently, his prior record was expunged and he was registered by the Department on December 23, 1975.

5/ We believe this case is best decided on constitutional rather than statutory grounds. With deference, we disagree with Judge Newman's narrow construction of Conn. Gen. Stat. § 4-61p as set forth in his concurring opinion. Section 4-61o provides that, before a person with a criminal record can be denied employment by the State or be disqualified to engage in a business that requires state registration or licensure, there must be an individualized assessment of that person's fitness according to certain specified criteria. Automatic disqualification due to a prior criminal conviction is proscribed. However, the legislation is inapplicable to "any law enforcement agency" unless such agency voluntarily adopts the provisions of the act. Conn. Gen. Stat. § 4-16p.

We read this exception to apply to the Department of State Police, as one such law enforcement agency, in its registration and licensing procedures as well as in its hiring practices. The Commissioner of the Department so interpreted the enactment at the time the General Assembly was considering its passage and, as a consequence, the exception has been extended in practice over the years to the registration and licensure policies affecting the employment of private detectives and security guards. We are further reinforced in our interpretation of the exception by the stipulation entered into between the Attorney General and plaintiff's counsel that existing law automatically bars felony offenders from engaging in the occupations of private detectives and security guards. Amended Stipulation of Facts, par. 8.

6/ In Connecticut, the Board of Pardons consists of five members appointed by the governor with the advice and consent of either House of the General Assembly. The Board has no office nor does it have a telephone listing. It does not have written materials to acquaint the public with its powers or procedures. While an applicant for a pardon may be represented by an attorney and present witnesses, there are no published guidelines or standards limiting or governing the Board's discretion. Pardons are granted or denied without written or oral explanations. If a person receives an absolute pardon, he may have his criminal record erased by applying to the Court where the conviction occurred.

7/ The judgment, of course, does not limit the power of the State to enact reasonable standards and procedures to assess a felon's fitness or capacity to be registered as a private detective or security guard.

NEWMAN, District Judge (concurring in the result):

I agree that plaintiff cannot be summarily denied registration and thereby employment as a private detective solely because of his prior felony conviction. However, I find it unnecessary to consider the constitutional issue decided by the Court because I believe the pertinent state statutes should be construed to entitle plaintiff to the hearing he seeks.

Connecticut's scheme for regulating the occupations of private detective and security guard involves two concepts: licensure and registration. No person can engage in the business of (a) a private detective or investigator, or (b) a watchman, guard or patrol service without a license from the Commissioner of State Police. Conn. Gen. Stat. § 29-153. No person can work as an employee of those in business in these fields without registering for such employment with the Commissioner of State Police. Conn. Gen. Stat. § 29-156a. Licenses will not be given to any person convicted of a felony, Conn. Gen. Stat. § 29-154a, nor can any felon be registered for employment as a private detective or security guard. Conn. Gen. Stat. § 29-156a(c).

In 1973, however, the Connecticut General Assembly enacted broad legislation substantially restricting the extent to which a felony conviction can be used as an automatic barrier to employment. Conn. Pub. Acts 73-347. Having made a legislative finding that "the public is best protected when criminal offenders are rehabilitated and returned to society

prepared to take their places as productive citizens and that the ability of returned offenders to find meaningful employment is directly related to their normal functioning in the community," the legislature announced that it is "the policy of this state to encourage all employers to give favorable consideration to providing jobs to qualified individuals, including those who may have criminal conviction records." Conn. Gen. Stat. § 4-61n. This policy is implemented by a prohibition against disqualifying any person from employment by the State or its agencies or from pursuing any occupation for which state licensure or registration is required solely because of a prior criminal conviction, unless it is specifically determined that the applicant is unsuitable after an individualized consideration. This assessment must include (1) the nature of the crime and its relation to the position sought, (2) the extent of rehabilitation, and (3) the time elapsed since the conviction or release from confinement. Conn. Gen. Stat. § 4-61o. This statute applies "[n]otwithstanding any other provision of law to the contrary." Ibid. However, another provision of the 1973 legislation renders the act inapplicable "to any law enforcement agency," although such an agency may adopt the new restrictive policy voluntarily. Conn. Gen. Stat. § 4-61p.

Thus, under § 4-61p, the State Police, as a law enforcement agency, is exempt from the provisions of § 4-61o and can continue to bar all felons from employment with that agency. The statutory issue in this case, however, is whether

the law enforcement agency exception of § 4-61p exempts the State Police from the procedures of § 4-61o not only in its own employment decisions, but also in its licensing and registration decisions as well.

The legislative history sheds little light on the scope of the law enforcement agency exception. The floor debates do not consider the issue. See Connecticut General Assembly Proceedings 1973, House Vol. 16, Part 11, pp. 5464-65 *id.* Senate Vol. 16, Part 5, pp. 2272-73. The record of the Hearings of the Joint Standing Committee on Human Rights & Opportunities, 1973, contains a letter dated March 13, 1973, from the State Police Commissioner to the committee. *Id.* at 164. In that letter the Commissioner expressed his understanding that the exception applies to hiring by the State Police. He goes on to request that the exception should also "extend" to licenses and permits issued by the department and he specifically refers to private detectives. That language standing alone might suggest that the Commissioner thought that the exception, as written, did not include licensing and registration. The Commissioner went on to say, however, that "[i]f this bill does except the State Police Department in all these areas, we would have no further comment concerning this." It is evident, therefore, that the Commissioner himself was unsure whether or not the exception included licensure and registration. His letter to the committee alerted the legislators to the ambiguity, but they failed to resolve it. Thus the issue of statutory construction is left

for judicial interpretation, with scant legislative guidance.<sup>1/</sup>

I think the statute should be narrowly construed to exempt State Police hiring but not licensing and registration. Though the statute exempts "any law enforcement agency" without specification of agency functions, there are several considerations that point toward a narrow reading exempting only the State Police hiring function. In the first place, the legislature emphatically expressed a broad policy against absolute barriers to employment based on prior felony records. The exception to this policy should be narrowly construed to provide the minimum departure from the legislature's rehabilitative objective. Secondly, whatever the public interest in absolute disqualification of felons from employment, that interest is less substantial when the employer is a private detective or private security guard agency than when it is the State Police Department or other State law enforcement agency. Third, reading the exception broadly to include State Police licensure and registration would create anomalies unlikely to have been intended by the legislature. For example, under a broad reading of the exception, a felon would be automatically disqualified from serving as a night watchman for a licensed private agency supplying contract service to a state agency operating sensitive facilities such as the National Guard Armory or Bradley International Airport, but would be eligible for employment if the departments operating these facilities chose to hire him directly. It would also mean that a convicted bigamist would automatically be barred

from night watchman employment with a licensed private guard agency, but a convicted embezzler could not automatically be barred from employment as a licensed real estate broker. I doubt that the legislature intended such results. Finally, a broad reading of the law enforcement agency exception would encounter the substantial constitutional objections that a majority of this Court has considered and found to be well taken. Cf. Pordum v. Board of Regents of State of New York, 491 F.2d 1281 (2d Cir.), cert. denied, 419 U.S. 843 (1974). Even if some legislators were willing to permit such bizarre results, the statute should make such intention unmistakably clear before a court is called upon to adjudicate its constitutionality. Neither the subsequent practice of the State Police nor the acquiescence of the State Attorney General's office in this suit persuades me that the legislature should be relieved of the obligation to make plain the broad authority asserted by the defendant.

For all these reasons, I conclude that § 4-61p exempts only State Police hiring from the prohibition of § 4-61o, leaving State Police licensing and registration subject to the procedural safeguards of the latter provision, and that the automatic disqualification provisions of § 29-156d have been modified by the procedural provisions of § 4-61o. I therefore concur in the result that the plaintiff is entitled to have his application for registration considered pursuant to § 4-61o.

FOOTNOTE

1/ Abstention might be appropriate to permit the plaintiff to seek a state court construction of the statute that would avoid the constitutional issue. However, I think it appropriate to resolve the statutory issue now to avoid further delay, especially in the absence of any request by the defendant to defer consideration pending a state court determination.

Supreme Court, U. S.  
**FILED**

**NOV 21 1977**

**THOMAS ROSSAK, JR., CLERK**

**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1976**

**No. 76-1171**

**JAMES Y. CARTER, Public Vehicle License  
Commissioner of the City of Chicago,**

*Petitioner,*

**vs.**

**LUTHER MILLER, on his own behalf and on  
behalf of all others similarly situated,**

*Respondent.*

**On Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit**

**REPLY BRIEF OF PETITIONER**

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**REPLY BRIEF OF PETITIONER**

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**ARGUMENT**

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I.

**The Applicable Equal Protection Standard Is The  
Traditional Rational Relationship Test.**

The Court of Appeals considered the question of which  
equal protection standard should be applied to the ordi-  
nance and concluded that it should be the rational

relationship test. In his concurring opinion Judge Campbell observed (App. pp. 28-33) that because no fundamental interest is affected and no suspect class involved that the more severe strict judicial scrutiny test requiring demonstration of a compelling governmental interest is not called for. Rather he declared that petitioner "need only establish that the classification is rationally related to a legitimate legislative purpose." (App. p. 31) In a note (App. p. 32) Judge Campbell also observed:

Nor do I believe as plaintiff contends, that *Reed v. Reed*, 404 U.S. 71 (1971) created a new and more stringent equal protection standard in cases which do not require application of the strict scrutiny rule. *Reed* evidences no intention to deviate from the rationality standard, except perhaps in sex discrimination cases, which may well involve a "suspect class."

In this Court respondent appears to renew his suggestion that Chicago's ordinance requires application of a standard of review more stringent than the traditional rational relationship measure. He states that ex-offenders constitute a "discrete and insular minority". (Respondent's Brief, pp. 13-19) Such minorities, he continues, include those who "belonged to a politically vulnerable and/or traditionally disadvantaged group." Decisions of this Court are cited including *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which noted "the special responsibility recognized long ago by this Court to scrutinize carefully laws directed against a 'discrete and insular' minority."

It is true that subsequent to the *Carolene Products Co.* decision this Court recognized several legislative classifications which it held subject to a more searching equal protection standard than the rational relationship

test. Such classifications have included those based on race, see *Loving v. Virginia*, 388 U.S. 1 (1967), and *McLaughlin v. Florida*, 379 U.S. 184 (1964); those based on alienage, see *Graham v. Richardson*, 403 U.S. 365 (1971), *Sugarman v. Dougall*, 413 U.S. 634 (1973), *In re Griffiths*, 413 U.S. 717 (1973) and *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); those based on ancestry or national origins, see *Oyama v. California*, 332 U.S. 633 (1948); and probably those based on sex, see *Frontiero v. Richardson*, 411 U.S. 677 (1973). These classifications have been called "suspect" and legislative enactments based upon them have been held subject not to the rational relationship standard but to the more rigorous "strict judicial scrutiny."

Neither ex-offenders nor any subgroup of ex-offenders have ever been held a suspect class. *James v. Strange*, 407 U.S. 128 (1973), prominently cited by respondent, held invalid a Kansas statute which denied to indigent criminal defendants basic protections against debt collection remedies statutorily available to all other debtors. In reaching its conclusion this Court did not hold criminal defendants or convicts to be a suspect class. Nor did it apply a strict scrutiny test or any other equal protection standard more searching than the traditional rational relationship test. The opinion holds only that the statute's discrimination against one group of debtors, indigent criminal defendants, was not rationally related to the statute's purpose—the recoupment of state funds. *Rinaldi v. Yeager*, 384 U.S. 305 (1966), similarly applied the rational relationship standard and found a statute requiring reimbursement to the state for transcripts for unsuccessful appellants confined in state institutions, but excusing reimbursement from those not confined, to result in an invidious discrimination.

It also is clear that this Court found the rational relationship test appropriate in *Baxstrom v. Herold*, 383 U.S. 107 (1966). The court there held invalid a statute which granted a hearing on the question of dangerous mental illness to all persons, including convicts, except those convicts who happened to be imprisoned at the time the determination was to be made. That distinction, the Court declared, removed "all semblance of rationality of the classification." 383 U.S. at 115.

None of the cases involving criminal defendants or ex-offenders have held such classifications to be "suspect" for equal protection purposes; nor have those cases applied any equal protection standard more stringent than simply requiring that the classification bear a rational relationship to a legitimate legislative purpose. On the other hand those cases cited by respondent in which a standard more stringent than the rational relationship test has been applied have been those in which a suspect class was affected and the test then applied has been strict judicial scrutiny. No third equal protection test has been announced or defined by this Court and the class of ex-offenders has not been identified by this Court as one for which peculiar equal protection solicitude is warranted. For these reasons it is submitted that the equal protection standard applicable to Chicago's ordinance is the traditional rational relationship test.

## II.

### **The Ordinance Is Rationally Related To Determining The Present Fitness Of Cab Drivers.**

In his original brief in this Court petitioner noted that the purpose of the ordinance is the advancement of public safety. The ordinance is premised upon the

legislative judgment that use of a deadly weapon to commit a crime evidences a peculiar propensity for violence and disregard for human life. The ordinance also recognizes that taxi passengers are uniquely vulnerable to violence at the hands of a taxi operator. Passengers are inevitably uninformed of the identity and character of their driver. Yet they must place themselves in an isolated, highly mobile vehicle where they are entirely dependent upon the will and disposition of the driver. Responsibility for their safety is a burden necessarily thrust upon the licensing authority.

The Court of Appeals did not question the purpose of the ordinance which it acknowledged to be public safety. (App. p. 21) That Court, however, held that the ordinance discriminates irrationally among the class of ex-offenders because it conclusively bars applicants with weapons convictions but provides for discretion in the matter of revocation of the licenses of incumbent licensees who have such convictions. Respondent in this Court has additionally emphasized a series of other equal protection objections to the ordinance, generally to the effect that the restrictions made by the ordinance are irrationally over- and under-inclusive and that they are not sufficiently focused upon the applicant's present fitness.

Respondent first suggests (Brief, pp. 25-26) that the ordinance has already been declared invalid on irrationality grounds in *Roth v. Daley*, 119 Ill. App. 2d 462, 256 N.E. 2d 166 (1970). Roth, an ambulance attendant-driver for twelve years and operator of an ambulance service for six years, was summarily denied renewal of his license. This was the result of an ordinance amendment which, for the first time, subjected ambulance drivers to the provision of ineligibility as a con-

sequence of convictions for commission of a crime with a deadly weapon. Roth's conviction, which antedated the beginning of his ambulance driving career by several years, had not been a barrier to his licensure prior to the amendment of the ordinance; after the amendment of the ordinance Roth was automatically denied the license without a hearing. The Appellate Court of Illinois held the ordinance invalid *as applied to Roth*.

In the circumstances of *Roth* the application of the new ordinance to an incumbent licensee resulted in a summary and automatic revocation of a license which Roth had exercised, apparently without fault, for a period of twelve years. The irrationality of this result is not continued under current application of the ordinance. Revocation of the license of incumbent public chauffeurs is, under the provisions of the ordinance, discretionary and can be effected only after a hearing. Indeed, it is as a result of the fact that petitioner does provide hearings for incumbents such as Roth that the Court of Appeals has now held the ordinance invalid.

In arguing that the ordinances' prohibitions are under-inclusive respondent observes that under the terms of the ordinance applicants having convictions for various offenses other than those involving use of a deadly weapon might, upon a favorable exercise of discretion, obtain a license as early as eight years after conviction. Thus he notes (Respondent's Brief, p. 31) that those convicted of "serious" offenses such as kidnapping, and automobile-related offenses including involuntary manslaughter and reckless homicide, unlike those convicted of crimes with deadly weapons, might eventually be eligible for a taxi driver's license.

It is perhaps true that kidnapping and some other crimes not enumerated by the ordinance as conclusive bars to licensure are offenses quite as anti-social as the

deadly weapons offenses which do permanently bar issuance of a license. If the purpose of the ordinance were to impose sanctions upon offenders or simply to protect the public from dishonest, careless or unskilled drivers these omissions would be serious defects in the ordinance. But the City has not sought through imposition of the conclusive bar against the specified ex-offenders to protect the public from all conceivable dangers. Only the dangers posed by a violently disposed driver against a captive passenger were the target of this ordinance provision. And it can hardly be irrational to suppose that one who has been convicted of a crime with a deadly weapon is substantially more likely to be disposed toward such action than one who has committed other crimes, reprehensible or anti-social as they may have been.

In *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) at 489, this Court stated:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. Texas*, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semlar v. Dental Examiners*, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash Co.*, 335 U.S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Plainly the principles stated by Justice Douglas in *Williamson* are applicable in this case. Unsafe drivers may pose a threat to public safety but the Equal Protection Clause should not be used to invalidate a

legislative measure which has focused directly and forcefully upon a different threat. The possibility of a violent crime being committed against a passenger by a cab driver convicted of an offense not specified in the ordinance as a permanent bar no doubt exists. If that possibility should materialize it is a problem which could then be legislatively addressed. But until and unless experience proves that danger to be acute it is not irrational to concentrate upon the most obvious danger—violence by those convicted of such crimes in the past.

A rather different argument of under-inclusiveness is made by respondent in his observation that the restrictions on public chauffeur licenses are more severe than on any other profession licensed by the City. (Respondent's Brief, pp. 37-39). Clearly the possible dangers posed by auto-repairmen, pool room operators, house-movers and the several other occupations listed by respondent is very different from that posed by cab drivers. As *Williamson, supra*, holds, the Equal Protection Clause does not require that dangers of all kinds and magnitudes be dealt with identically and simultaneously.

On the other hand, respondent also suggests several grounds upon which he concludes that the ordinance is invalid for over-inclusiveness. He argues that not all crimes committed with a deadly weapon are of such gravity that they warrant exclusion of the offender from cab driving. He also criticizes the inclusion of certain sexual and narcotics offenders among those prohibited from obtaining the license. Plainly differing aspects of the public safety problem underlie these several restrictions. Additionally it is not the "seriousness" of either deadly weapons crimes or of the other offenses which was critical to their inclusion in the ordinance. Rather,

it is the peculiar vulnerability of cab passengers to harm at the hands of a driver which caused weapons offenses to be included. Moreover, as respondent's complaint (App. pp. 3-8) readily demonstrates, his conviction was for armed robbery and he sought relief only from the provisions of the ordinance directed at those convicted of offenses involving the use of deadly weapons. This case has been argued and decided below exclusively on that issue and resolution of the issues which might be raised by other provisions of the ordinance should await another plaintiff and another legal action.

Respondent also contends (Brief, p. 35) that the ordinance is overbroad in applying not only to taxi drivers but also to ambulance and bus drivers for which occupations he argues that the restrictions of the ordinance are completely without justification. Respondent is incorrect in his assertion that bus drivers are regulated by the ordinance. By its own terms Chapter 28-1 excludes from the definition of public passenger vehicles (for which public chauffeur licenses are required) all Chicago Transit Authority and public utility drivers; thus bus drivers are not subject to the provisions of the ordinance. It is true that Sections 103-12 and 103-13 of the Municipal Code of Chicago which provide for the licensing of ambulance drivers incorporate the provisions of Section 28.1-3. However respondent did not apply for an ambulance driver's license and would not have been eligible to drive an ambulance on the basis of the license for which he did apply. Moreover, it is hardly irrational to conclude, as the City Council evidently did, that an ambulance patient is exposed to the same sort of danger as a cab passenger and accordingly requires the same sort of protection.

Respondent also has argued that although a policy of forbidding those recently convicted of certain offenses from driving cabs may be rational the ordinance here at issue is invalid as a result of the permanent barrier it raises against those convicted of crimes with deadly weapons. (Brief pp. 28-39). The ordinance, he argues, is irrational for its failure to take into account the likelihood of rehabilitation and to focus upon present fitness by conducting hearings. Rehabilitation has been recognized by the City as a high social priority and as a process to which the City can and does contribute in its own hiring policies and regulations as respondent admits. (Brief pp. 37-39) But in meeting its responsibility to protect the cab-using public the City has recognized that expertise in reliably predicting rehabilitation successes is not yet available. Judge Campbell observed in his concurring opinion (App. p. 32):

"The past conduct of an applicant may be the best indicator of his present character and his future actions. As the *amicus curiae* brief filed in appellant's [Respondent's] behalf by the Chicago Council of Lawyers and the John Howard Association concedes, well over 60% of those arrested for the commission of crimes nationally are ex-offenders.

Plainly courts, parole boards and the criminal justice system generally, lack the ability to accurately identify rehabilitated and unrehabilitated ex-offenders. An ordinance which simply acknowledges this fact in the face of a sensitive area of regulation is not irrational.

Respondent suggests, however, that because the City has a system in place for judging the fitness of current licensees it should not be allowed to protest the inapplicability of that system to applicants. (Brief, pp. 40-42, 52). But in the case of applicants the petitioner would be compelled to predict rehabilitation; whereas

with licensees the task is primarily that of evaluating a history of the performance of cab-driving duties. The factors to be considered and the inferences which must be drawn are very different.

## CONCLUSION

Both respondent and *amici curiae* contend that the ordinance is irrational on various grounds. Closely examined, however, their arguments do not demonstrate the irrationality of the ordinance. It is not irrational to believe that a man's past behavior is the most reliable indicator of his future conduct. Nor is it unreasonable to enact legislation which acknowledges the fact that present rehabilitative efforts are only partially and unpredictably successful. It also is not unreasonable to consider actual job performance records of those already licensed, as is done in the case of incumbent licensees, rather than summarily revoking their licenses. This is a cautious policy but is not irrational.

For the reasons stated above it is respectfully requested that the judgment of the Court of Appeals be reversed and the judgment of the District Court be affirmed.

Respectfully submitted,

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No. 76 - 1171

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**On Writ Of Certiorari To the United States  
Court of Appeals For the Seventh Circuit**

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**BRIEF OF SAN FRANCISCO LAWYERS' COMMITTEE FOR  
URBAN AFFAIRS AS AMICUS CURIAE IN SUPPORT  
OF RESPONDENT**

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IN THE  
Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1171

JAMES Y. CARTER, Public Vehicle License  
Commissioner of the City of Chicago,

*Petitioner,*

vs.

LUTHER MILLER, on his own behalf and on  
behalf of all others similarly situated,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF OF SAN FRANCISCO LAWYERS' COMMITTEE FOR  
URBAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF  
RESPONDENT

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INTEREST OF AMICUS CURIAE<sup>1/</sup>

Statutory requirements for a license as a condition of employment are widespread in the United States. In California, for example, more than 178 vocations require a license. They include even such occupations as barbering<sup>2/</sup> and dry cleaning.<sup>3/</sup> Vocational licensing statutes pose a common obstacle to employment of persons with criminal convictions, because many of the statutes restrict the issuance of licenses to such ex-offenders. These restrictions constitute a particular frustration to those offenders who are trained for licensed vocations in prison rehabilitation programs.

The San Francisco Lawyers' Committee For Urban Affairs ("The Committee") is an organization of lawyers practicing in the City and County of San Francisco whose goal is to provide legal services to the urban community. In early 1973 the Committee enlisted several lawyers in the firm of Orrick, Herrington, Rowley & Sutcliffe in a *pro bono publico* project designed to give legal services to persons who were having difficulties obtaining vocational licenses because of previous criminal

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<sup>1/</sup> Letters from counsel for the parties to this action consenting to the filing of this brief *amicus curiae*, have been filed with the Clerk of the Court pursuant to the U.S. Supreme Court Rule 42(2).

<sup>2/</sup> CAL. BUS. & PROF. CODE §§6545, et seq.

<sup>3/</sup> CAL. BUS. & PROF. CODE §§9500, et seq.

convictions. The object of the program, in part, is to aid ex-offenders in overcoming barriers to obtaining meaningful employment.

Since the project began four years ago, lawyers from Orrick, Herrington, Rowley & Sutcliffe have counseled over twenty-five individual ex-offenders seeking licenses in more than a dozen licensed vocations. The extensive practical experience gained during those years, especially in administrative fitness proceedings, gives the Committee a particular knowledge of administrative practice in the vocational licensing area and of the invalidity of arguments raised by Petitioner, the City of Chicago, in its brief.

#### PRELIMINARY STATEMENT

Chapter 28.1-3 of the Municipal Code of the City of Chicago bars any applicant who has ever been convicted of certain felonies from ever obtaining a license as a taxi driver. Although the Code provides for a hearing for all persons whose applications are denied,<sup>4/</sup> the right to a hearing given to ex-offender applicants is meaningless, because denial of licenses to ex-felons is mandatory without regard to their present fitness.

The same Code also provides that a licensee convicted of any of the same crimes is entitled to a meaningful hearing as to his present fitness before his

<sup>4/</sup> Chicago Mun. Code, Chapter 28.1-10.

license can be revoked; that is, he may be successful by means of the hearing in retaining his license.<sup>5/</sup>

The court below held that the discrimination between licensees and applicants denied equal protection to those ex-offenders who had not previously held licenses. The Committee submits this brief because Petitioner's scheme denies equal protection to ex-offender applicants in denying them, unlike other applicants, a genuine opportunity to demonstrate their fitness for a license, and because and in light of its experience, the arguments by Petitioner to justify this statutorily created discrimination are groundless.

#### ARGUMENT

##### **I. THE CHALLENGED STATUTORY SCHEME DENIES EQUAL PROTECTION TO EX-OFFENDERS IN THAT IT UNJUSTIFIABLY DISCRIMINATES AGAINST THEM.**

The challenged statutory scheme here clearly discriminates against persons with certain felony convictions who are seeking licenses as cab drivers in favor of applicants without such convictions. A conviction perforce prevents an applicant from obtaining a license, without any opportunity to display his current fitness. Those who do not have a conviction, on the other hand, are entitled to a hearing to determine their present fitness.

<sup>5/</sup> Ibid.

The question is whether there is sufficient justification for this scheme such that the discrimination is not violative of the Equal Protection Clause.

Petitioner has asserted in its brief that in enacting this discriminatory scheme the City was attempting to meet its responsibility to protect the public from criminal actions by taxicab operators.<sup>6/</sup> As justification Petitioner, without any supporting evidence, asserts:

The rationality of an *inference* of unfitness for cab driving based upon the commission of an armed felony *cannot be questioned*.  
[Brief of Petitioner, p. 9] [Emphasis added.]

To Petitioner, such "inference" is sufficient to justify discrimination against a class of persons which effectively bars them from a vocation for life.

As may be seen below, the Committee's experience shows not only that this conclusive "inference" is disputable but also that it is often, indeed the Committee's results show, nearly always unwarranted.

<sup>6/</sup> Brief of Petitioner, p. 8. Whether this is actually the purpose of the statute is questionable. As in *Craig v. Boren*, U.S. \_\_\_\_\_, S.Ct. 451, 50 L.Ed. 2d. 397, reh. den. 97 S.Ct. 1161 (1977), it is not self evident on the face of the statute and Petitioner has cited no statutory history identifying this as the purpose. Whether the purpose claimed by Petitioner is indeed the true purpose behind the statute is especially suspect in this as in any case of vocational licensing restrictions. See, discussion, *infra*, at p. 14.

Therefore, because the discrimination does not bear the necessary relationship to the purported object of the legislation, Petitioner's scheme violates the Equal Protection Clause of the Constitution of the United States.

## **II. THE JUSTIFICATION FOR THE DISCRIMINATORY STATUTORY SCHEME HERE IS REFUTED BY THE COMMITTEE'S EXPERIENCE**

The Committee's experience shows that, during the administrative process ex-offenders more often than not do actually convince agencies of their present fitness. Specifically, of the eighteen (18) ex-offenders the Committee has represented in formal proceedings with agencies, seventeen (17) are now licensed. All of these ex-offenders made their criminal records known to the agency in their application.

These results attest to the irrationality of the lifetime conclusive inference that all ex-offenders are unfit to practice the vocation of driving a cab. In the Committee's experience ex-offender applicants have time and again proved to licensing agencies their present fitness to be licensed despite acknowledged criminal convictions as serious as first degree murder. The agencies have been satisfied with the present fitness of the ex-offenders after, in some cases, informal meetings with the ex-offender applicants and in others, after formal administrative hearings.

The plain fact is that, regardless of their past criminal records, ex-offenders may now be rehabilitated

and fit to be licensed; and a meaningful hearing will give them the chance to prove that fitness. Indeed, by statute in California vocational agencies regulated by the Business & Professions Code may not deny licenses to ex-offender applicants unless the ex-offender's conviction was "substantially related to the qualifications, functions or duties of the business or profession for which application is made"<sup>7/</sup> and the agency finds the applicant is not rehabilitated.<sup>8/</sup>

The fact that seventeen of the eighteen ex-offender applicants are now licensed shows that the inference upon which the City relies above not only can be questioned, but that it is rarely sound. The statutory scheme in question here is so vastly over-inclusive as to be irrational and certainly is not sufficiently related to the achievement of what Petitioner claims to be its objective. The scheme contradicts its stated premise by giving licensed taxicab drivers who are convicted as felons the meaningful hearing that is denied to applicants. If there is any validity to drawing an inference of unfitness from the fact that an applicant has a felony conviction, and the Committee's experience shows that there is not, the inference would also have to apply to those who have

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<sup>7/</sup> CAL. BUS. & PROF. CODE §480 (West).

<sup>8/</sup> CAL. BUS. & PROF. CODE §482 (West).

committed a felony while licensed. As the Court of Appeals cogently noted in this case:

In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977).

This contradiction of the validity of the conclusive "inference" of unfitness because of a felony conviction is itself the best evidence that discrimination between those with a prior conviction and those without does not closely serve to achieve the purported objective of the statute.<sup>9/</sup>

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<sup>9/</sup> In basing its defense of the scheme on the conclusiveness of this "inference", petitioner also falls prey to another Constitutional infirmity by creating an invalid "irrebuttable presumption." See, Judge Campbell's opinion concurring with the Court of Appeals decision in this case, 547 F.2d at 1319, and cases discussed therein.

If the irrebuttable presumption doctrine is applicable to any fact situations beyond those to which it has already been applied, then it should be applied here where the presumption has been so often rebutted when the ex-offender is given a fair, individualized hearing. See, *Vlandis v. Kline*, 412 U.S. 441 (1973), where in finding constitutionally invalid an irrebuttable presumption that a student residing outside of a state when applying to a university

**III. THE HEARING PROCESS IS A  
PROVEN WAY TO MAKE MEANINGFUL  
DETERMINATIONS WHICH DO NOT  
VIOLATE THE EQUAL PROTECTION  
CLAUSE.**

The City attempts to justify the obvious irrationality of giving a hearing to ex-felon licensees but not to ex-felon applicants by claiming that the hearing process is more valid for licensees than for applicants because they have a "track record" while an applicant has none. The fact is, however, that an applicant may have just as lengthy a track record driving a taxicab in another jurisdiction or in another related vocation, such as driving a bus. It is also possible that a licensee may have little or no track record at all; that is, a licensee may be convicted before he has had any employment, or at least any

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would remain an out-of-state resident so long as he was a student, this Court said:

The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause when there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised. In the situation before us, reasonable alternative means for determining bona fide residence are available. 412 U.S. at 451.

As in *Vlandis*, there is certainly a reasonable alternative means available here for making individualized determinations: administrative fitness hearings.

significant employment as a taxicab driver. See *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977).

More fundamentally, in the experience of the Committee, licensing agencies and administrative law judges have had no difficulty acting on just the type of evidence (probation reports, dissimilar employment experiences, and psychological evaluations) which Petitioner claims is useless to make a valid judgment that the ex-offender applicant is fit to be licensed.<sup>10/</sup>

The central issue in the administrative hearings in which the Committee's attorneys have participated has been rehabilitation. Applicants have produced evidence of activities in and after prison, probation and parole reports, and psychological evaluations. In addition, factors such as the age of the offender at the time of the offense and the length of time since the conviction have been found relevant. Applicants have also offered testimony of family, friends, parole officers, and other licensees in the vocation involved.

Licensed professionals who have personal acquaintance with ex-offender applicants have been pertinent witnesses in administrative hearings because of their expert opinion that the ex-offender in question is fit to be licensed. In many of the cases in which the Committee's attorneys have participated, these profes-

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<sup>10/</sup> Brief of Petitioner, p. 13.

sionals have testified about their work experience with the ex-offenders in vocation-related jobs. <sup>11/</sup> Often these jobs were obtained by the ex-offenders in conjunction with early parole from prison. The professionals have testified to their shock on learning that ex-offenders, who have proved themselves fit for early release and who have then performed creditably in a job leading up to the licensed vocation, are threatened with having their vocational aspirations shattered by denial of license based solely on prior convictions for which the ex-offenders have already been punished.

Parole officers who have appeared as witnesses on behalf of ex-offender applicants at hearings in which the Committee has participated have also testified not only as to the rehabilitation and fitness of the ex-offenders, but also as to the importance of meaningful employment for the ex-offender in his long-range reintegration into society. <sup>12/</sup> None of this readily available and

<sup>11/</sup> For instance, applicants trained in prison as vocational nurses have on their release worked as hospital orderlies and nursing assistants.

<sup>12/</sup> The Task Force Report: *Corrections* (1967), of the President's Commission of Law Enforcement and Administration of Justice has also condemned the irrationality of occupational licensing restrictions as undermining a meaningful corrections system, because "unemployment may be among the principal causal factors in recidivism of adult male offenders." The Report

important evidence can be considered or even come to light in the scheme Petitioner seeks to defend.

In the Committee's experience the administrative law judges who have presided at hearings and the agencies themselves have shown no reluctance at all to act on just such evidence. In short, the proof of fitness which ex-offender applicants have produced at these hearings, both formal and informal, has been both reliable and convincing to the agencies.

The effectiveness of applicant hearings distinguishes the proper decision in this case from *Weinberger v. Salfi*, 422 U.S. 749 (1975). In *Salfi* the Court held that wage earners' widows and step-children had no right to an individualized hearing to determine whether their relationship to the wage earner was legitimate even though it had begun less than nine months before his death. The Court was not convinced that hearings would be effective. The present case is entirely different. As the Committee's experience shows, individual determinations can

recognized that:

"... licensing laws usually do not confine restrictions to situations in which there is a rational connection between an offense and the practice of an occupation. Licenses are in many cases primarily revenue measures or else products of pressure by unions or trade associations to limit access to an occupation." *Id.* at 33.

effectively uncover those unfit to drive a cab, for fitness is reliably determinable by the licensing agency. For the same reasons, the effectiveness of applicant hearings also distinguishes this case from *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

The persuasiveness of the evidence which ex-offenders have produced at these hearings is shown most clearly when one recognizes that in California the burden of proving rehabilitation at the administrative level is entirely upon the ex-offender. Once a criminal conviction has been established, it is entirely up to the applicant to prove rehabilitation. The success of the ex-offenders in administrative proceedings is therefore doubly revealing of the probity of the evidence on which agencies have awarded licenses to ex-offenders.

Since Petitioner already has the administrative machinery to have hearings for licensees with felony convictions, of course there can be no argument that its scheme is based on administrative convenience. As the Court stated in *Stanley v. Illinois*, 405 U.S. 645, (1972), in holding unconstitutional a statute that denied an unwed father an opportunity to prove that he was a fit parent:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication.

But the Constitution recognizes higher values than speed and efficiency. 405 U.S. at 656 [Emphasis added.]

**IV. PETITIONER'S CLAIMED BASIS FOR ITS DISCRIMINATION IS IMPEACHED BY THE LIKELY ACTUAL PURPOSE OF ITS STATUTORY SCHEME: TO PROTECT THOSE ALREADY LICENSED BY RESTRICTING ENTRY TO THE VOCATION.**

That the arguments offered by Petitioner to justify its discriminatory scheme sound hollow, or that Petitioner offers no evidence to support its claimed legislative purpose should not be surprising. It is well known among expert commentators that the true reason for such restrictions is to protect those already licensed. As professor Walter Gellhorn recently wrote:

That restricting access is the real purpose, and not merely a side effect, of many if not most successful campaigns to institute licensing schemes can scarcely be doubted. Licensing, imposed ostensibly to protect the public, almost always impedes only those who desire to enter the occupation or "profession," those already in practice remain entrenched without a demonstration of fitness or probity.<sup>13/</sup>

<sup>13/</sup> Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 at 11 (1976). See also, Moore, *The Purpose Licensing*, 4 J. Law & Econ. 93 (1961); Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 Wm. & Mary L. Rev. 46, 47 - 49 (1972); Note, *Occupational Licensing: An Argument for Asserting State Control*, 44 Notre Dame L. Rev. 104, 109 (1968); Barron, *Business and Professional Licensing - California, A Representative Example*, 18 Stan. L. Rev. 640 (1966); Gellhorn, *Individual Freedom and Governmental Restraints*, 105 - 51 (1956).

More specifically, the President's Commission on Law Enforcement has identified the interest of licensee groups in restrictions based on criminal records as follows:

Such groups tend to be primarily concerned with advancing the interest of their own members. Thus, when faced with the problem of whether to license persons with criminal records, they may be unduly concerned with the effect on the status of their professions. Further, to the extent they try to consider the public interest, they are likely to have an unrealistic view of the importance of their own profession or occupation and the potential harm to the public that might be done by unfit persons. They tend to give inadequate weight to the interests of the convicted persons, and to those of society as a whole in having the contributions of this person and in not forcing him back into a life of crime.<sup>14/</sup>

The scheme here is more obvious than most in attempting to restrict membership to the vocation: it gives those already entrenched a hearing in which to prove their present fitness even though they may have committed certain felonies, while denying this basic fairness to ex-offenders outside the profession.

<sup>14/</sup> President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967), at 91.

If the true purpose behind Petitioner's arrangement is recognized, there need be no concern that a finding that the scheme is unconstitutional will result in an amendment of the ordinance to the detriment of licensees.<sup>15/</sup> It is highly unlikely that current licensees, who presumably were a potent legislative lobby supporting the restriction in the first place, will permit a legislature to limit their own right to a revocation hearing. In addition the agencies themselves are likely to resist such a limitation, because they have shown a desire to maintain much discretion in licensing as possible. For instance, in one case in which the Committee has participated both the agency and the reviewing trial court upheld the denial of a license to an ex-offender. When an appeal was threatened, the agency granted the desired license to the ex-offender in exchange for an agreement not to prosecute an appeal from its previous denial. This capitulation can be best explained as reflecting the agency's desire not to have its denial tested on appeal lest an adverse decision limit the agency's administrative discretion. At any rate, a law which denied a licensee a hearing before his license

<sup>15/</sup> This was a concern of Judge Campbell, who agreed with the majority below that the scheme in question is an irrational denial of equal protection, but feared that the deficiency would be remedied by "amending the ordinance so as to provide for the automatic revocation of any license held by a person who, subsequent to issuance thereof, is convicted of certain felony offenses." 547 F.2d at 1319 - 20.

could be revoked would arguably violate the Due Process Clause of the Constitution. <sup>16/</sup>

<sup>16/</sup> The irrational conclusive inference that felony convictions mean occupational unfitness for life also denies due process to ex-offender applicants just as much as it would licensees. Due process clearly applies to occupational licensing, for the Court has said that "any qualification must have a rational connection with the applicant's fitness or capacity to practice" the vocation. *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 239 (1957). While *Schware* dealt with arrests rather than convictions, the Committee's experience shows that there is no more rational relation between felony convictions and taxi driver vocational fitness than there was between arrests and capacity to practice law in *Schware*.

*DeVeau v. Braisted* 363 U.S. 144 (1960), cited by petitioner, is not to the contrary. In *DeVeau* this court upheld an act which provided that ex-felons could not work as port watchmen. The case was superficially similar to this one, but a closer look reveals a crucial difference. The Court based its decision on the fact that:

New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation. (363 U.S. 144 at 159-60). [Emphasis added].

The City of Chicago cites no evidence that ex-felons are unfit to drive taxis. Quite the opposite, the Committee's experience demonstrates that, given a hearing, many ex-offender applicants could likely prove their fitness.

## CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,  
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August, 1977

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**BRIEF OF THE AMERICAN BAR ASSOCIATION  
AMICUS CURIAE**

---

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**BRIEF OF THE AMERICAN BAR ASSOCIATION  
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**INTEREST OF AMICUS CURIAE**

The American Bar Association is a national membership organization of the legal profession. It counts as members more than 219,000 lawyers from all states. For many years the Association has maintained an active interest in the improvement of the criminal justice system.

Most relevant to this case, in 1970 the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services. In this way the Association sought to exercise responsible leadership in examining correctional problems and stimulating needed change in federal, state, and local systems for the correction and rehabilitation of offenders. Two of the various projects sponsored by the Commission have an especially close connection with the issues in this case. The National Clearinghouse on Offender Employment Restrictions, which operated from November, 1971 to March, 1977, identified legislative and practical impediments—including restrictive licensing practices—which inhibit the employment of ex-offenders<sup>1</sup> and thereby increase the chance of recidivism. The Clearinghouse worked with government officials and others to remedy these ill-conceived and counter-productive practices. During the Clearinghouse's life significant improvements were made in half of the states in the form of changed laws and policies.

Similar efforts have been engaged in by state and local bar associations. Some of these have been financed in part by grants provided through the Commission's BASICS program (Bar Association Support to Improve Correctional Services). One of the associations which received such support was the Chicago Council of Lawyers. It concluded its study of Chicago and Illinois licensing practices in April, 1975.

In 1975 the Association expressed its opposition to laws which deny occupational licensing of ex-offenders without consideration of the relationship between the offender's record and the position or license sought. More recently, the Association's Joint Committee on the Legal Status of Prisoners published a *Tentative Draft of Standards Relating to the Legal Status of Prisoners*. Portions of the *Tentative Draft* expand on the 1975 policy. The 1975 policy and relevant *Tentative Draft* standards are set forth in the Appendix.

<sup>1</sup> The negative impact of a conviction on employment opportunities has been recognized by this Court. *James v. Strange*, 407 U.S. 128, 139 (1972).

As early as 1921 the American Bar Association adopted standards for legal education, providing in part that every candidate for admission to the bar "should be subject to an examination by public authority to determine his fitness."<sup>2</sup> This Court has authoritatively determined that "fitness" to enter the sensitive legal profession embraces the candidate's present fitness,<sup>3</sup> a sound precept which the Association supports. It is to argue the applicability of this precept to other fields of endeavor that the Association sought the consent of the parties to the filing of this brief *amicus curiae*.<sup>4</sup>

### QUESTIONS PRESENTED BY AMICUS

Is a municipal ordinance which prohibits issuance of a public chauffeur's license to an ex-offender convicted of armed robbery—for that reason only—violative of the Equal Protection Clause when present licensees face only discretionary revocation of their licenses upon conviction of an identical offense? Is it violative of the Due Process Clause to deny licensure in these circumstances without any individualized determination of fitness?

### STATEMENT OF THE CASE

Luther Miller is an ex-offender. As a young man, in August, 1965, he was convicted of armed robbery in the Circuit Court of Cook County, Illinois. He was sentenced to a term of seven to twelve years in the penitentiary. After serving seven years, he was released on parole in February, 1972. Eighteen months thereafter, having complied with the terms and conditions of his parole, he was unconditionally discharged.

In September, 1974, Miller sought to apply for a public chauffeur's license pursuant to a municipal ordinance as a

<sup>2</sup> 46 *Reports of the American Bar Association* 38, 47 (1921).

<sup>3</sup> *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 246 (1957).

<sup>4</sup> Copies of letters indicating the parties' consent have been filed with the Clerk of the Court.

preliminary step to seeking private employment as a taxi-cab, public transit or ambulance driver. However, upon informing an agent of the Public Vehicle License Commissioner that he had once been convicted of armed robbery, the agent declined to accept his application. Relying on the ordinance at issue here, the agent wrote: "Anyone convicted of armed robbery may *not apply*." (App., at 10) (emphasis added). Thereafter, Miller filed suit in the United States District Court for the Northern District of Illinois to vindicate his rights as guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Miller also alleged his rights under the Eighth Amendment were violated. Miller also sought to have the case certified as a class action, a matter which the District Court did not pass in granting Defendant Carter's motion to dismiss on January 17, 1975.

### 1. The Ordinance

Chapter 28.1-2 of the Municipal Code of the City of Chicago, enacted in 1951, makes a public chauffeur's license a prerequisite for any person wishing to be employed "transporting . . . passengers for hire." The ordinance is administered by the City's Public Vehicle License Commissioner, who may require from an applicant any information pertaining to "character, reputation . . . past employment and conduct" deemed relevant by him to qualification for a chauffeur's license.

The Commissioner submits the name of each applicant to the captain of the police district in which the applicant resides for an investigation into the "character and reputation" of the applicant. *Chicago Municipal Code* Ch. 28.1-4. The police report is submitted to Carter, who approves or disapproves the application:

If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license. *Chicago Municipal Code* Ch. 28.1-4.

Thus, the ordinance grants the Public Vehicle License Commissioner broad investigative power before final approval of any applicant for a chauffeur's license, as well as discretion in determining whether the applicant is a "suitable" person for licensure.

No system of individualized assessment is apparently employed in the case of ex-offenders such as Miller. The Commissioner is denied authority to approve the application of a person who has been convicted of an offense involving the use of a deadly weapon. Chapter 28.1-3 provides, in relevant part:

No public chauffeur's license shall be issued to any person who has been convicted of a felony or any criminal offense involving moral turpitude within eight years prior to his application for such license, excepting only if such person shall have received, since the time of his conviction, an honorable discharge from any branch of the armed services of the United States of America, and if, in the discretion of the public vehicle license commissioner, such person is trustworthy of the responsibility imposed by the issuance of such license. *No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape.* (emphasis added.)

It is the constitutionality of the emphasized portions of this section which is at issue in the case at bar.

Another provision of the *Chicago Municipal Code* Ch. 101 *et seq.* governs the administration of all licensing ordinances within the City of Chicago, including the Public Chauffeur's Ordinance. If a license application is denied after an investigation into an applicant's "character or fitness," Chapter 101-5 provides that the applicant "shall be notified in writing, of the reasons for the disapproval." He may then request a hearing on the disapproved application. Similarly, those already licensed may request a hearing if their license is revoked. *Id.* Ch. 101-27.

Respondent Miller has not sought nor been granted a hearing. Such a hearing apparently would be meaningless, because the ordinance deprives the Public Vehicle License Commissioner of any discretion to issue a license, regardless of the findings of any investigation or hearing, to a person such as Miller.

### DECISIONS OF THE LOWER COURT

The District Court had before it only Miller's amended complaint, Carter's motion to dismiss and Miller's opposition thereto when it granted the Commissioner's motion in a short memorandum opinion. (App., at 15-16). The District Court found the ordinance was rationally related to a legitimate public purpose, "the protection of the public who makes use of public vehicles" and that the classification established by the provision absolutely precluding Miller's licensure was rational. The District Court also found the Eighth Amendment inapplicable since the ordinance did not seek to punish offenders.

The Court of Appeals reversed in a *per curiam* opinion *Miller v. Carter, supra*. In analyzing the provisions of ordinance itself, the Court noted that, although each applicant must satisfy a "good character and reputation" investigation, the Commissioner is not allowed to issue a license to persons such as Miller who have been convicted of certain disabling offenses.

The Court of Appeals found the Commissioner's "purported justification" for this different treatment of similarly situated persons wholly unpersuasive. Rejecting the argument that the licensees' "track record" explains the distinction and concluding that "such distinctions among those members of the class of ex-offenders are irrational," the Appeals Court held that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment. Taking note of Miller's challenge to the "irrebuttable presumption" created by the ordinance, the *per curiam* opinion briefly reviewed the pertinent decisions of this Court, without drawing a conclusion as to their applicability.

One member of the panel, Senior District Judge William J. Campbell, filed a separate concurring opinion in which he carefully analyzed the irrebuttable presumption doctrine, found it applicable to this case, and concluded that the challenged ordinance failed to pass muster on due process grounds, as well as those relied on in the *per curiam* opinion.

On Carter's motion, the Court of Appeals stayed issuance of its mandate to enable Carter to seek review in this Court. Certiorari was granted April 18, 1977.

### SUMMARY OF ARGUMENT

The Chicago municipal ordinance which governs licensure of taxi drivers does not treat all persons who have violated criminal laws alike. It permanently prohibits some ex-offenders from obtaining a public chauffeur's license and creates an eight year waiting period in the case of others. Persons who hold licenses at the time of their conviction, however, are subject to a discretionary bar at most. Because the facts behind the convictions which create the prohibition in each case may be identical, but the results may be disparate, the Court of Appeals properly found the ordinance subjected some ex-offenders to "irrational" discrimination.

The challenged ordinance makes no provision for offenders such as Respondent to show they were not guilty of an offense which activates the permanent ban, or any facts concerning their rehabilitation. The language of the ordinance does not track the Illinois criminal code in material regards. Such inconsistencies can lead to grossly different outcomes for similarly situated persons. Thus some procedure seems essential for determining whether the permanent ban is applicable in individual cases.

The ordinance's true purpose appears to be to keep offenders thought to be dangerous from driving taxi cabs. But there is no material in the record to support the presumed

permanent dangerousness of former robbers. Indeed, there is evidence that in Illinois, at least, released armed robbers such as Respondent are unlikely to commit new offenses or be returned to prison within two years of their first release. In concluding to the contrary, the Chicago City Council ignored sound public policy considerations.

Finally, the opportunity to qualify for employment at a common calling such as taxi driving is important enough to merit at least the minimal Constitutional protection of an individualized, fact-related inquiry into the license applicant's fitness for that occupation.

### ARGUMENT

#### I. THE ABSOLUTE BAN ON LICENSURE OF SOME EX-OFFENDERS INCORPORATED IN CHICAGO'S PUBLIC CHAUFFEUR ORDINANCE IS IRRATIONALLY DISCRIMINATORY AND THEREBY DENIES THE EQUAL PROTECTION OF THE LAW TO SOME EX-OFFENDER APPLICANTS.

The Court of Appeals in this case held that "[a]n applicant for a [public chauffeur's] license who has committed [an armed felony] and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other." *Miller v. Carter*, 547 F. 2d 1314, 1316 (7th Cir. 1977) (*per curiam*).

Petitioner Carter asserts that treating licensees and applicants as similarly situated is "fundamentally erroneous." Petitioners' Brief at 11. That may well be; however, the Court of Appeals properly was not concerned with the differential treatment of *all* applicants and *all* licensees; rather the issue before the Court of Appeals and this Court is whether Chicago's public chauffeur ordinance improperly subjects to "irrational" discrimination some members of "the class of ex-offenders." *Miller, supra*.

Only at p. 2 of his Reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari has Carter specifically asserted that the Court of Appeals erred in examining the licensing scheme only as it applied to ex-offenders. Otherwise he has consistently sought to broaden the case to include issues which are not before this Court. Respondent has never challenged the authority of the City of Chicago to regulate the transportation of passengers for hire within its corporate limits. *City of Chicago v. Vokes*, 38 Ill. 2d 475 (1963). Nor has Respondent ever asserted that it is improper to root licensure in the "good character and reputation" of the applicant and the vague standard of being "a suitable person to be entrusted with driving a public passenger vehicle." *Chicago Municipal Code* Ch. 28.1-4. Indeed, Respondent has not even argued that his criminal history is irrelevant to his current fitness to drive a cab, the principal occupation of public chauffeurs. Respondent's only claim as regards the Equal Protection Clause is that if the local authorities deem criminal misbehavior to be relevant to the fitness issue, as they have, then they must deal with that criterion equally for all to whom it applies. Because the challenged provisions of the municipal code "discriminate irrationally" on their face, the Court of Appeals held them invalid under the Equal Protection Clause. *Miller, supra*.

While all ex-offenders are not alike, they share the fact of conviction, a characteristic which too often has been thought—in public and private sectors—to justify limitations on participation in the usual life of the community.<sup>5</sup> The Chicago

<sup>5</sup> Thus, some states limit the ex-offender's right to vote, *Richardson v. Ramirez*, 418 U.S. 24 (1974); some states disqualify them from holding public office, serving on juries, etc., (see restrictions enumerated in Special Project, the Collateral Consequence of a Criminal Conviction, 23 *Vand. L. Rev.* 929 (1970)); a variety of governments require offenders to register upon entry into the jurisdiction, Dreher and Kammler, *Criminal Registration Statutes and Ordinances in the United States—A Compilation* (1969); bonding companies deny coverage to insured's that employ ex-offenders, Lykke, "Attitude of Bonding Companies Toward Probationers and Parolees," 21 *Fed. Prob.* 37 (1957); and private employers deny jobs to ex-offenders for that reason alone, see, e.g., *Green v. Missouri Pac. R.R.*, 523 F. 2d 1290 (8th Cir. 1975). Offenders have generally been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (*per curiam*) (1976).

City Council thought that characteristic was relevant to public chauffeur licensure and so it is appropriate that the court below and this Court examine the manner in which the City Council ordained that it be considered.<sup>6</sup> *Amicus* respectfully submits that the fallacy of Chicago's peremptory approach to limiting ex-offenders access to jobs as taxicab drivers is the same as, and no less evil than, the Arizona alien employment law scrutinized here 60 years ago and struck down. *Truax v. Raich*, 239 U.S. 33 (1915). Accord *Sugarman v. Dougall*, 413 U.S. 634 (1974), and *In re Griffiths*, 413 U.S. 717 (1973).

**A. The Ordinance Permanently Prohibits Licensure of Some Ex-Offenders Without Regard to the Facts Underlying Their Offenses, and Delays it for Others, While Subjecting Licensees Whose Criminal Misconduct is More Recent to Purely Discretionary Sanctions.**

Conviction of an offense produces one of three consequences under the *Chicago Municipal Code* Ch. 28.1. An offender may be permanently precluded from driving a cab, *Id.* Ch. 28.1-3; he may be temporarily precluded, *Id.*; or he may not be precluded at all if previously licensed, *Id.*, Ch. 28.1-10.

The language of the ordinance permanently bars from licensure persons convicted of the following offenses: "a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape." *Id.*, Ch.

<sup>6</sup> Illinois' law respecting school bus drivers should be contrasted with the municipal ordinance challenged here. It is indicative of the growing trend to accord properly limited weight to an ex-offender's criminal record. The state law prohibits only temporarily the issuance of a school bus driver permit to persons convicted of various offenses, including murder, rape, deviate sexual conduct or assault, indecent liberties with a child, contributing to the sexual delinquency of a child, aggravated incest, possession, sale or exchange of instruments adapted for illegal drug use or abuse, possession of a deadly weapon, armed violence, and illegal manufacture, sale or delivery of controlled substances, among other specifically enumerated offenses. *Ill. Rev. Stat. Ch. 95 1/2, § 6-106.1 (a)(11)*. One convicted of these offenses may obtain a permit (other criteria having been satisfied) five years after conviction upon a showing he has led "an exemplary life and has become a law-abiding citizen." *Id.*

28.1-3. Relying on this provision, Petitioner declined to accept Miller's application. "Rape" is a specific offense under the Illinois Criminal Code, *Ill. Rev. Stat. Ch. 38, § 11-1*. However, "traffic in narcotic drugs," and "the infamous crime against nature" are not found therein as such. Although "incest" is a code offense, *Id.*, § 11-11, "aggravated incest" is a separate offense, *Id.*, § 11-10 and the ordinance challenged here strangely takes no note of it. The ordinance's use of outmoded or incorrect terminology makes it difficult to see how Petitioner can accurately relate, much less rationally relate, the criminal histories of certain applicants to the intent of the ordinance without some process.

The offense of armed robbery, Respondent's offense, *Id.*, § 18-2, requires that the perpetrator be "armed" with a "dangerous" weapon. By its terms the ordinance requires "use", *Chicago Municipal Code* Ch. 28.1-3, an apparently different criterion. The facts of Miller's case, therefore, may not bring him within the intended scope of the permanent licensing prohibition. Even if Miller both possessed and used a weapon in 1965, it is not necessarily true that the weapon then found "dangerous" was also "deadly" as the ordinance requires. Subsequent events also may dissipate the propriety of allowing Respondent's conviction to stand in bar of licensure.<sup>7</sup>

Temporary preclusion under the ordinance is applicable to a person who, during the eight years prior to his application, was convicted of "a felony or any criminal offense involving moral turpitude." *Id.* While it is easy to determine if conviction was had for a felony, the concept of "moral turpitude" long has been criticized for its unpredictable elasticity.<sup>8</sup> Through its

<sup>7</sup> Petitioner's action has deprived Miller of the opportunity to show, if applicable, that his conviction had been overturned on collateral review or that a pardon had been secured. "Accordingly, the municipal ordinance states that applicants who have been convicted of a crime involving the use of a dangerous [sic] weapon are ineligible for a license and makes *no provision* for a contrary determination." Petitioner's Brief at 12 (emphasis added).

<sup>8</sup> Monheim, "Administrative Law: Professional and Occupational Licensing," 44 *Calif. L. Rev.* 403, 406 (1956).

focus on the conviction offense, the ordinance may allow disparate treatment of applicants whose objective behavior was identical. For example, the act of taking property from another while armed may actuate the permanent or temporary denial of a license depending on the outcome of plea bargaining.

An even more grossly inconsistent outcome would arise where the offense was premeditated murder by strangulation, poison, or arson, in which case only a temporary ban on licensing would apply, as an Illinois appellate court found in considering the instant public chauffeur ordinance in another ex-offender's case. *Roth v. Daley*, 119 Ill. App. 2d 462, 256 N.E. 2d 166 (1970). Offenses closely connected with safe operation of motor vehicles, such as involuntary manslaughter or reckless homicide, Ill. Rev. Stat. Ch. 38, § 9-2, appear to invoke only a delay in licensure, not an absolute ban.

Finally, depending on the rigidity of his interpretation of the ordinance, Petitioner may conceivably permanently deny licensure to one whose offense was misuse of an air rifle, for which "petty" offense the sentence is a fine which may not exceed \$500. Ill. Rev. Stat. Ch. 38, § 82-7. Because the District Court granted Petitioner's motion to dismiss before any evidence was heard, we do not know the actual consequences of these inconsistencies.

The irrationality of these differences is heightened in the case of the licensee. Under the ordinance, loss of a license previously secured is entirely discretionary; if the offense is one which would otherwise disqualify an applicant, the Petitioner may recommend license suspension or revocation to the mayor, "and the mayor, in his discretion, may revoke such license." *Chicago Municipal Code* Ch. 28.1-10. (emphasis added.) It is unknown whether previously issued licenses are unfailingly revoked by the Mayor when his discretion is called into play by the conviction of a taxi driver or whether a system of individualized determination is pursued. There is no evidence before the Court which supports Petitioner's assertion that "it must be

supposed that the licensing authority... will attach little significance to a brief employment record in weighing it against the conviction." Brief of Petitioner at 15.

**B. The Application of Minimal Rationality Standards to Chicago's Licensing Scheme Shows That it Does Not Afford Equal Treatment to Persons in Similar Circumstances.**

The Court of Appeals conceived that public safety considerations underlaid the ordinance, *Miller, supra*, 1316, and that is Petitioner's position as well: "The governmental interest at stake is the safety of taxi passengers..." Petitioner's Brief at 26.

An individual taxi driver may threaten the public safety through poor driving ability. In response to this threat the ordinance requires all applicants for municipal chauffeur's licenses to have a state chauffeur's license, *Chicago Municipal Code* 28.1-3, and authorizes the Public Vehicle License Commissioner to require applicants to demonstrate their driving skill, *Id.* at 28.1-5. Recognizing that certain physical conditions, such as poor vision, or particular illnesses, such as epilepsy or "heart trouble," may give rise to continuing or sudden threats, respectively, provision is made for inquiring into these matters. *Id.*, 28.1-3.

Without identifying the conditions particularly, the ordinance specifies that "infirmity of ... mind ... may render [an applicant] unfit to drive a public passenger..." *Id.* This provision had led the instant Petitioner, in 1971, to deny a public chauffeur's license to Victor Freitag, a person who received treatment for a mental illness for six months in 1957. *Freitag v. Carter*, 489 F. 2d 1377, 1380 (7th Cir. 1973). Finding that the denial of the license as a "bad risk" without an inquiry into Freitag's "present mental condition or show[ing] him the evidence against him..." violated Freitag's right to due process under the decisions of this Court, the Court of Appeals affirmed the judgment of the District Court requiring

that procedural due process be afforded to denied applicants. *Id.*, 1384. Subsequent to the District Court's decision, but prior to the hearing in the Court of Appeals, the Chicago City Council amended Chapter 101 of the Municipal Code, the "General Licensing Provisions," assertedly to provide due process to rejected applicants. Despite some linguistic problems, in that litigation the defendants claimed and the Court of Appeals found, *Id.*, 1383, that these new rules applied to the ordinance in question here. Carter did not seek *en banc* review of *Freitag* in the Seventh Circuit, nor petition for a writ of certiorari in this Court.

Petitioner has accepted, therefore, that *current* fitness, determined through a hearing after notice, is the relevant measure of an applicant's qualification for licensure. His refusal, grounded in the unamended public chauffeur licensing ordinance, to even consider the current fitness of Respondent, while assessing the current fitness of other ex-offenders and newly offending, but already licensed, drivers is a denial of equal protection.

The only justification Petitioner asserts for failing to individually assess the fitness of ex-offenders such as Miller is that the evidence available in his case would be less reliable and probative than that supplied by a performance record. Petitioner's Brief at 13. Administrative convenience is specifically disaffirmed. *Id.* However, the ordinance would bar issuance of a license to a person with Miller's offense history, even if that person had just left the identical job in another city, where a

performance record would have been established.<sup>9</sup> Moreover, Petitioner will assess the current fitness of offenders barred from licensure for eight years and non-offending members of the general public, although members of either group will lack a directly relevant "track record." Hence, Petitioner has failed to suggest any honest basis for not assessing Respondent's qualifications, a failure which makes clear that the ordinance is not at all related, much less rationally so, to the asserted public safety goal.

**C. Contrary to Sound Public Policy, Chicago Municipal Code Ch. 28.1-3 Presumes the Unproven Dangerousness of Some Ex-Offenders and Denies Them the Right to Seek Gainful Employment as Taxi Drivers.**

Although the foregoing discussion dealt with this case in the light most favorable to Petitioner, accepting his assertions

<sup>9</sup> Indeed, Petitioner once invoked the identical provision challenged here in an attempt to deny a license to an armed robber whose "performance record" was acquired in Chicago. Leonard Roth was convicted of two counts of that offense in 1950. After confinement, he became an ambulance attendant-driver, in 1955, and subsequently the operator of an ambulance service. He had the proper licenses from the Chicago Board of Health. In 1967, ambulance attendant-drivers became subject to *Chicago Municipal Code* Ch. 28.1, and Roth applied for licensure under its provisions. Petitioner Carter denied the license, citing Ch. 28.1-3. The Circuit Court of Cook County subsequently entered judgment in Roth's favor in an action for declaratory judgment and mandamus. On appeal, the Appellate Court of Illinois, First District, affirmed that portion of the Circuit Court's judgment holding the instant language invalid and inapplicable to Roth. Carter was ordered to consider and act upon the application.

"In our opinion the provisions set forth in the last sentence in the last paragraph of 28.1-3 result in classifications which are unreasonable and arbitrary. Under these provisions an applicant who had perpetrated multiple murders by strangulation, poison or arson could be licensed, as could one who had been repeatedly convicted of Attempt to Rape, Burglary, Theft, Kidnapping, or Aggravated Battery. In view of this fact, we fail to perceive in what manner the prohibition contained in the ordinance bears any relationship to public health or safety." *Roth v. Daley*, 119 Ill. App. 2d 462, 256 N.E. 2d 166, 169 (1970).

regarding the purpose of the ordinance at face value, the ordinance's irrationality was plainly evident. It is readily apparent, however, that the ordinance also works a denial of equal protection to some would-be cabbies by permitting the application of unarticulated criteria.

The formal licensing criteria established by the challenged ordinance seek to provide a means by which Carter can prevent persons thought by the City Council to be necessarily dangerous from operating a taxi. Two provisions of the ordinance, Ch. 28.1-3 and Ch. 28.1-10, suggest that current or future dangerousness cannot unfailingly be concluded from the objective facts found during a criminal trial in which guilt was established by proof beyond a reasonable doubt.

Thus, a licensee who has demonstrated through his performance that he has not violated his responsibilities as a cab operator, even though subsequently convicted of an armed felony, might nevertheless be found fit to continue in his employment. Petitioner's Brief at 13.

And an applicant guilty of an offense not enumerated in Ch. 28.1-3 of the ordinance faces no immutable hurdles to licensure after eight years. Petitioner makes no claim of inability to assess the dangerousness of ex-offenders in either of these groups; and, as a result of *Freitag*, he must also assess the dangerousness, to the extent relevant, of persons who may be mentally "infirm." But, a person such as Respondent can never, ever, lift the implication of dangerousness with which he is enshrouded by the language of the ordinance.

The implicit conclusion required by the ordinance that Miller is now and will remain forever too dangerous to be entrusted with operation of a cab is not supported by the facts of this case. Upon his conviction for armed robbery in 1965, Miller was sentenced to 7 to 12 years in the Illinois State Penitentiary. Brief for Plaintiffs-Appellants at 2, *Miller, supra*. He was paroled after seven years, his minimum sentence. *Id.* The period of parole was 18 months, at the expiration of which

period Miller was discharged. *Id.* Both the parole release and discharge decisions required the Illinois Parole and Pardon Board to make affirmative, discretionary decisions in Miller's favor under the applicable laws and rules.<sup>10</sup> Thus, shortly before Miller sought licensure as a public chauffeur, an official state agency with the responsibility and expertise to assess his behavior found him to be trustworthy.

Miller is not an unusual parolee in abjuring, as his parole conditions required, new criminal misconduct following his release from prison. When he sought a public chauffeur's license he had been at liberty for over two years. In 1972, Illinois paroled a total of 1792 males, of whom 318 had been committed for armed robbery. Two years after their release, 95 percent of these persons had not been returned to prison.<sup>11</sup> Illinois' experience is slightly better than the national average. Even in the broader data, however, there is no support for the inherent "dangerousness" of released armed robbers which can be inferred from the ordinance. Two years after release, 86 percent of the national cohort of armed robbers released in 1972 had not been returned to prison by reason of a new major conviction or a new major allegation;<sup>12</sup> and the same percentage remained at liberty after three years.<sup>13</sup>

Thus, permanent prohibition of the licensure of armed offenders, as applied to a person such as Miller, strays so far from the facts as to amount to a totally arbitrary ban. The lines drawn by the ordinance appear to be "the reflection of historic

<sup>10</sup> *Ill. Rev. Stat.*, 1971, Ch. 208, § 203; Ch. 23, § 2519, 2523; Ch. 38, § 123-4.

<sup>11</sup> Conversation with William L. Simonich, Research Analyst, Parole and Pardon Board, Illinois Department of Corrections, July 5, 1977.

<sup>12</sup> National Council on Crime and Delinquency Research Center, "Trend Analysis—Males, 1972 Two Year Follow-Up," Table VII, Part 1, Uniform Parole Reports (May, 1976). These data include outcome information on 100 percent of Illinois' 1972 parolees.

<sup>13</sup> *Id.*, "Three Year Follow-Up Analysis—1972 Parolees," Table VII, Part 1 (December, 1976). These data also include 100 percent of the 1972 Illinois parole cases.

prejudice rather than legislative rationality." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98 (Marshall, J., dissenting.) (1973).

Furthermore, any deference which might have been accorded to the 1951 enactment of the Chicago City Council in earlier times is no longer due. Absent a showing, which Petitioner has not even attempted to make, that any evil then existing<sup>14</sup> still persists, the ordinance must be evaluated in its present context.<sup>15</sup>

In addition to its evident failure to relate rationally to the asserted goal of enhancing public safety, the ordinance Petitioner defends is not rationally related to broader penal policy. Whether confinement of an individual offender be initiated to incapacitate or rehabilitate him, deter others from like misconduct or merely to evidence society's wrath, as the Chief Justice has said:

We take on a burden when we put a man behind walls, and that burden is to give him a chance to change. If we deny him that, we deny his status as a human being, and to deny that is to diminish our own humanity and plant the seeds of future anguish for ourselves.<sup>16</sup>

The implicit policy of this ordinance is "The Imprisonment Ends; the Sentence is Forever,"<sup>17</sup> a policy Illinois has explicitly rejected.

<sup>14</sup> There appears to be no legislative history which may be examined to help understand the rationale for the City Council's enactment and provide a gauge of its rationality.

<sup>15</sup> As this Court itself has acknowledged, government bodies sometimes advance facially rational arguments in support of their actions rather than the "other, less weighty considerations" which may have led to them. *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632, 641 (1974).

<sup>16</sup> Burger, "No Man is an Island," address to the 1970 Mid-Winter Meeting of the American Bar Association, reprinted in ABA Commission on Correctional Facilities and Services, *Thoughts on Prison Reform: The Corrections Addresses of the Chief Justice of the United States*, 10 (1975).

<sup>17</sup> The quotation is the title of a study of the employment problems of ex-offenders in New York by Rick Waldemar (1972).

Effective January 1, 1973, Illinois enacted the Unified Code of Corrections.<sup>18</sup> Among the purposes of the *Code*, two are especially relevant here:

(c) prevent arbitrary or oppressive treatment of persons adjudicated offenders . . .

(d) restore offenders to useful citizenship *Ill. Rev. Stat. Ch. 38, § 1001-1-2*. In an effort to make this policy effective, the legislature made clear the temporary nature of the deprivations to which offenders could be subjected under the Unified Code of Corrections:

#### § 1005-5-5. Loss and Restoration of Rights

(a) Conviction and disposition shall not entail the loss by the defendant of any civil rights, except under this Section.

(b) A person convicted of a felony shall be ineligible to hold an office created by the Constitution of this State until the completion of his sentence.

(c) A person sentenced to imprisonment shall lose his right to vote until released from imprisonment.

(d) On completion of sentence of imprisonment or on a petition of a person not sentenced to imprisonment, all license rights and privileges granted under the authority of this State which have been revoked or suspended because of conviction of an offense shall be restored unless the authority having jurisdiction of such license rights finds after investigation and hearing that restoration is not in the public interest.

Additional evidence of Illinois' policy is provided by other work of the 77th General Assembly. That legislature approved over thirty measures, specifically providing that conviction of an

<sup>18</sup> P.A. 77-2097, approved July 26, 1972.

offense would not constitute a bar to licensure in a variety of trades and occupations, including medicine and pharmacy in which the public has a special interest.

Indeed, it appears that the Mayor of Chicago had recognized the inappropriateness of the historical employment discrimination ex-offenders have faced and had committed the City to setting an example for private industry. At the same time as Respondent Miller was being released in February, 1972, Mayor Richard J. Daley was writing Congressmen Mikva and Railsback:

Dear Congressmen Mikva and Railsback: . . . Chicago has recently undertaken what I believe is a significant new project in the field of offender rehabilitation. . . . As you know, most men leave our various penal institutions with only the means to maintain themselves for a short period of time. In addition, present employment practices tend to freeze a parolee out of the labor market. Few firms are willing to hire the ex-convict in any capacity. With its parolee employment [sic] program, the City of Chicago hopes to alter significantly the above conditions. The City will hire 100 ex-convicts—both men and women—who will work on a wide variety of jobs, e.g., truck driver, forestry laborer, counselor, or secretary. Support will not be restricted to employment alone. . . . Perhaps even more significant than the employment and support services themselves is the fact that the City is setting a trend which industry will hopefully follow. Doors previously barred to ex-convicts may open as a result of the policy set by the City of Chicago.

There are, of course, many other areas in the corrections field demanding attention today. I believe, however, that one of our most significant challenges is

to reduce the level of recidivism among offenders. I am hopeful that the parolee employment program is a step toward this objective.<sup>19</sup>

## II. WHERE FITNESS IS ESTABLISHED AS A LICENSING CRITERION, DETERMINATION OF FITNESS MUST BE INDIVIDUALIZED TO COMPORT WITH THE DEMANDS OF THE DUE PROCESS CLAUSE.

Decisions of this Court establish that the individual's interest in gainful employment is sufficiently great to warrant protection. *Smith v. Texas*, 233 U.S. 630 (1914); *Truax v. Raich*, 239 U.S. 33 (1915); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 412 U.S. 717 (1973); *Hampton v. Mow Sun Wong*, 429 U.S. 88 (1976); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976).

Requiring Petitioner to recognize the significance of this interest and afford Respondent Miller a forum for demonstrating his fitness to function as a cab driver will not make it impossible for the City of Chicago to discharge the burden it has assumed of screening prospective drivers. It will merely focus the Petitioner's inquiry on facts which may relate to fitness and prohibit reliance on convenient shibboleths, as this Court has required in other areas where the fact sought to be relied upon was not necessarily or universally true. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *U.S. Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The review of particularized facts thus required will not guarantee Respondent a license. Nor, in the event Respondent is licensed, will it guarantee him employment as a taxi driver. The pecuniary interest of taxi cab companies in avoiding

<sup>19</sup> Letter from Hon. Richard J. Daley to Hon. Abner J. Mikva and Hon. Thomas Railsback, reproduced in "Corrections," Hearings Before Subcomm., No. 3 of the House Comm. on the Judiciary, 92nd Cong., 2nd Sess., ser. 15, pt. VI at 124 (1972).

litigation and liability to passengers ~~in the event of misconduct~~ by taxi drivers assures that ex-offenders such as Respondent will be multiply screened before they are allowed to take seats behind the wheel.

That a review of particularized facts is a viable alternative to the current practice of dealing with presumptions must be conceded by Petitioner. The ordinance already requires such reviews for all persons other than those in the class of which Respondent is a member. With an existing, presumably effective mechanism in place, the only decision required of this Court is that it be used to determine the fitness of another group of applicants.

Petitioner relies on *DeVeau v. Braisted*, 363 U.S. 144 (1960), for the proposition that statutory imposition of an employment disability on an ex-offender does not deny due process. His reliance on that case is misplaced. First, the enactment there scrutinized was no simple municipal ordinance, enacted without a record of careful consideration. The Waterfront Commission Act was part of a complex, interstate plan, approved by the Congress, after extensive examination in several forms of waterfront criminality. More significantly, the Act contained its own limitations, recognizing the possibility of executive clemency or a parole board certificate of good conduct as intervening factors which could mute the enacted prohibition. Thus, the ban in *DeVeau* was both less severe and more clearly necessary than the ban in this case. Lacking the degree of necessity and care which went into formulation of that ban, *Chicago Municipal Code*, Ch. 28.1-3 cannot stand.

## CONCLUSION

For the reasons set forth above, the American Bar Association urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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ROBERT B. MCKAY  
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JOANN R. DEUTCH

August, 1977

**APPENDIX**

**RESOLUTION ADOPTED BY THE  
AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES  
AUGUST, 1975**

*Resolved*, That the American Bar Association calls for the elimination of all laws which (a) deny government employment or occupational licensing of ex-offenders without consideration of the relationship between the offender's record and the position or license sought, and (b) permit adverse action against ex-offenders seeking government employment or occupational licensing based on arbitrary criteria, and further,

*Resolved*, That the American Bar Association urges the federal, state and local governments to assure that ex-offenders receive full and fair consideration in hiring and licensing decisions subject to their control.

**TENTATIVE DRAFT OF STANDARDS  
RELATING TO THE LEGAL STATUS OF PRISONERS\*  
RECOMMENDED BY  
THE ABA JOINT COMMITTEE ON THE  
LEGAL STATUS OF PRISONERS**

**10.4 Employment and Licensing**

(a) Barriers to employment of convicted persons based solely on a past conviction should be prohibited unless the offense committed bears a substantial relationship to the functions and responsibilities of the employment. Among the factors which should be considered in evaluating the relationship between the offense and the employment are the following:

(i) the likelihood the employment will enhance the opportunity for the commission of similar offenses;

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\* 14 *Am. Crim. L. Rev.* 377, 414 (1977).

- (ii) the time elapsed since conviction;
- (iii) the person's conduct subsequent to conviction;
- (iv) the circumstances of the offense and the person that led to the crime and the likelihood that such circumstances will recur.

(b) *Private Employment and Occupational Licensing.* Each jurisdiction should enact legislation protecting persons convicted of criminal offenses from unreasonable barriers in private employment. Such legislation should officially govern (1) refusing employment; (2) discharging persons from employment; (3) refusing fair employment conditions, remuneration, or promotion; (4) denying membership in any labor union or other organization affecting employability; and (5) denying or revoking a license necessary to engage in any occupation, profession, or employment . . .

(f) *Regulated Activities Other Than Employment.* Licensing or other governmental regulations should not exclude automatically persons convicted of any offense from participation in regulated activities. Persons should not be barred from regulated activity on the basis of a conviction unless the offense committed bears a substantial relationship to participation in the activity. In determining whether such a relationship exists, the factors listed in (b)\* should be considered.

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\* The parenthetical reference to subparagraph (b) contained in subparagraph (f) is a typographical error. The correct reference is to subparagraph (a).